

# AMERICAN BAR ASSOCIATION JOURNAL

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## CURRENT EVENTS

### *Passing of One of the Association's Founders*

ON receipt of the news of the death of Mr. Alfred Hemenway of Boston, one of the founders of the American Bar Association and a life member of this organization by special resolution adopted by the annual meeting at Denver, President Silas H. Strawn appointed the following committee to attend the funeral ceremonies: Hon. Charles S. Whitman, Hon. Francis Rawle, Hon. Moorfield Storey, Hon. J. Weston Allen and Hon. James M. Beck. The ceremony was impressive and the attendance large, thus testifying to the esteem in which Mr. Hemenway was held by the bar and the public of the community and state in which he lived. A memorial sketch appears in another part of this issue.

### *To Investigate Ambulance Chasing in New York*

THE Association of the Bar of the City of New York recently adopted strong resolutions on the subject of "ambulance-chasing" and instructed its committee on Law Reform to make an investigation of the evil and to report thereon. The resolutions declare that "this practice tends to undermine public confidence in the administration of justice and in the honor and integrity of the Bar as a whole, contributes in a large measure to the congestion of the calendars of our courts, is rendered possible and directly fostered by contingent fee arrangements whereby the poor and ignorant are oppressed and victimized, and laws against champerty and maintenance violated, perjury encouraged and increased, and attorneys acquiring a disproportionate interest in their cases are induced to violate their obligations to the court and to the profession, and to engage in practices inconsistent with the high ideals of the Bar." The resolutions further declare "that it is the sense of the Association of the Bar of the City of New York that in furtherance of the purposes for which it is organized, its energies be

earnestly and unremittingly devoted to the study of the conditions herein described, to the end that the means by which the evil practices may be curbed or eradicated may be ascertained, and the proper steps taken to cause such remedies to be put in force and to become effective."

### *Mid-Winter Meeting of Executive Committee*

THE mid-winter meeting of the Executive Committee will be held at New Orleans, La., on Jan. 9 and 10, 1928. In addition to attending to routine financial matters, a number of other important matters will be considered, among them the selection of the place for the forthcoming Semi-Centennial Meeting of the Association. Invitations have already been received from several cities. The special committee on program for the Semi-Centennial Celebration, composed of members of the Executive Committee and having President Strawn for its chairman, will, it is understood, have a meeting in New Orleans. The Roosevelt Hotel will probably be headquarters for the Executive Committee.

### *New Rules for Admission in Pennsylvania*

A SUMMARY of the new rules promulgated by the Supreme Court of Pennsylvania on September 30, relative to the registration of students, the study of the law, and admission to the Bar, has been prepared by Chief Justice Robert von Moschzisker of that court and appears in the October issue of the "Temple Law Quarterly." The rules were adopted following a decision of the State Bar Association not to suggest at this time "any changes in scholastic requirements for registration and admission to the bar," but to recommend a set of rules designed to bring about a more stringent investigation into the moral qualifications of applicants for registration as law students.

"The principal points of the rules, adopted by the

Supreme Court on September 30, 1927, may be summarized thus," says Judge von Moschzisker: "Every student at law must have as his preceptor a resident, active, member of the Pennsylvania Bar, who has enjoyed at least five years' practice in the county where such student desires to register, and no law office may have more than three students at one time. Before anyone may register as a law student or take the preliminary examination, his preceptor must certify that he has personally known the candidate for at least six months, and must answer a searching questionnaire as to the applicant's environment, reputation and character. Each preceptor is required to keep in touch with his students, by correspondence or otherwise, particularly with such of them as may be attending law schools, and he must actively endeavor to help them 'to understand the duties, responsibilities and temptations of the profession.' Moreover, he must endeavor to develop in the students an appreciation of the ethics of the profession, and, upon completion of a student's law course, he must 'certify to the State Board concerning the character of the student and his fitness to become a creditable member of the bar.' Under the rules, no certificate for registration as a law student will be issued by the State Board until it is satisfied that the applicant is of 'good moral character,' in addition to possessing the required preliminary education. In other words, if an applicant is not found to be of proper character he will be denied the privilege of taking the preliminary examination and of registering as a student at law in Pennsylvania.

"In order to enable the State Board to do properly

the work required by these new rules, the aid of the county boards of examiners will be employed, and where no such bodies exist, the courts of common pleas will be asked to appoint them. In every case, at least two members of the local board are to answer separate questionnaires concerning their knowledge, directly or indirectly acquired, of the environment and character of each candidate for registration in their county. Such a questionnaire is to be answered also by each of three 'reputable citizens' of the neighborhood or community in which the candidate resides; and the latter himself is subjected to a most searching set of questions.

"If the applicant is permitted to register as a student, he must devote himself to the study of the law for at least three years, as prescribed by the rules, and another searching investigation into his character is to take place before he shall be permitted to enter the law examinations. Finally, before a candidate may be admitted to the bar, he must serve a clerkship in his preceptor's office, of at least six months. This rule as to clerkship, which will particularly benefit students who attend law schools, requires regular daily service in the preceptor's professional business and under his direction for at least six hours a day during usual office hours; but the six months specified need not be continuous."

#### *Announcement of Prize Competitions*

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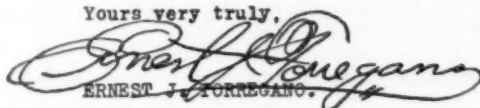
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one thousand dollars and a bronze medal, as a first prize, and two sums of one hundred dollars each, as second prizes with honorable mention, will be awarded to the authors of the best essays or monographs submitted by March 1, 1929, on the subject known as "Scientific Property" i. e., the granting of a quasi-patent right to the discoverer of a principle of science.

The subject for the award in 1927 was "The Law of Radio-Communication," and the prize was awarded, on June 16, 1927, to Stephen Davis, Esq., member of the bars of Oklahoma and New York, and formerly Solicitor to the United States Department of Commerce.

The present offer was originally open only to members of the legal profession in the United States or Canada; but has now been enlarged to include all countries of the world.

Conditions of the award and information as to scope of subject can be secured by addressing the Law Department, Northwestern University, Chicago, Ill.

The Trustees of the Michigan Law Review Fund, a fund established some years ago by Mr. William W. Cook of the New York Bar for the benefit of the Michigan Law Review, offer one prize of \$500 for the best essay, and one of \$250 for the second best essay upon "American Institutions." The essay may be historical, sociological, legal or otherwise. The purpose is to stimulate the study of American institutions, to define them, explain them, and familiarize Americans with them by es-

says having literary as well as historical merit. It is not the intention to confine the discussion to legal or political institutions, nor to prefer legal phraseology to a more popular style. The object is to produce essays that will appeal to and be read by the public. The judges will be requested to consider style as fully as the subject matter. These prizes will be offered annually until further notice. The competition is open to all and the essays may be of any length. The essays must be submitted on or before October 1, 1928, and by the same day in successive years.

All inquiries for information regarding this competition and the copies of essays submitted therefor should be addressed to Professor Grover C. Grismore, Secretary, Board of Governors of the Lawyers Club, University of Michigan, Ann Arbor, Michigan.

## Signed Articles

As one object of the American Bar Association Journal is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this Journal assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.



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## OUR CHANGING RESPONSIBILITIES

The Persistent March of Civilization, the Activities of the Inventor and the Scientist, and the Amazing Developments in Every Field of Human Endeavor Have Imposed New and Increased Responsibilities on the Lawyer of Today—Need for a Combination of the Purely Intellectual and the Practical—Specialization—His Higher Obligation to the State—Bar Not Losing Influence Under Present Conditions\*

BY SILAS H. STRAWN  
*President of the American Bar Association*

THOSE of us who first hung out our shingles as lawyers in the rural districts thirty-five years or more ago, remember the prominent lawyer in the community. His chief asset was oratory, which was always fluent and on tap. His fame was not local, it spread to adjoining counties. We generally found him on one side or the other of every important piece of litigation arising in the territory wherein he was famous. He "rode the circuit" and, before the days of the railroad or the modern means of transportation, frequently on horseback. He did not require clients to seek his advice in a luxuriously furnished office. He was ready, willing and considered himself able to deliver a wise opinion upon almost any legal question on the "curbstone."

The oratory of this distinguished country lawyer was availed of not only by numerous, yet sometimes not too liberal clients, but it also was used in expounding political doctrines in campaign times and to intoxicate and thrill with joy crowds on the 4th of July, Decoration Day and at other celebrations. In those days the lawyer practiced more by ear than by note. There were fewer reported decisions and precedents and less frequent changes in the fundamental law. The lawyer knew little of trade or of business. Litigation was his specialty. He was a destructive rather than a constructive agent.

Frequently this lawyer was impecunious. Abraham Lincoln told the story of one of these leaders of the Bar who was the subject of an execution as the result of his failure to pay his grocery bill. The constable, armed with a writ, made inquiry of one of this lawyer's friends as to his available assets. The friend answered by saying that Jones had a wife and a fine boy of ten years who was potentially, though perhaps not marketably, of inestimable value; that in his office there was a pine table, generally littered with papers; two or three rickety chairs; a veteran but still serviceable cuspidor; a book case containing a few reports furnished free by the Government, a volume of the statutes, obsolete by reason of more recent action of the Legislature, and in the corner there was a large rat hole which was worth looking into. A few of this type of old fashioned country lawyer still exist, but if I may use a colloquial phrase, they are "rare birds."

During the last fifty years and more especially since the beginning of this century, the persistent

march of civilization, the activities of the inventor and of the scientist, and the amazing development in every field of human endeavor, have made the life of the lawyer of today one of constantly changing experience and increasing responsibility.

Contemplate, if you will, the labyrinth of laws and regulations that have come into force in the last twenty-five years respecting transportation, communication, revenue (especially taxes on incomes and inheritances), police power, employers liability, new forms of insurance, and a vast number of other subjects which time will not permit me to mention.

The passage of the Interstate Commerce Law by our Congress in 1887, with its various amendments including the Transportation Act of 1920, has wrought a complete revolution in the regulation and control of our railroads.

The protection of the rights of a railway company today entails an amount and a variety of knowledge on the part of the lawyer which, to the uninitiated, is almost incomprehensible. To properly advise operating officials, the lawyer must not only be familiar with the laws governing the construction and operation of railways in the localities through which the road runs, but he must know all of the rules and regulations which have been established or promulgated by the various commissions or regulatory bodies, state and federal, especially those respecting rates. He must also know the obligations of the carrier towards its employees and the public for personal injuries, the rights of the shipper in the event of delays or damage to his property, as well as how to dispose of a large number of other claims that may be asserted.

If the railroad fails to meet its fixed charges and is forced into a receivership, then comes its reorganization. There are involved the rights of creditors, of security holders and of the shareholders. The reorganization plan must not only protect existing rights, but must attract new capital and new investors. These reorganization plans or "set ups" require great skill, long experience and infinite labor and patience.

In addition to the railroad, the automobile, the motor bus, and other forms of surface transportation we have, with its daily increasing complications, the subject of "air rights." This includes not only the right to navigate the air by planes and other air craft and the establishment of air ports for landing purposes, but owing to the increasing congestion in our great cities, the surface of land is

\*Address delivered at the annual meeting of the California State Bar Association on S-M. 16, 1927.

now being used by an owner or lessee for one purpose while the air above a certain level may be in another ownership and devoted to another purpose.

There are many cases where owners retain for their own use the surface or subsurface of their property and lease or sell their rights above a certain space for the construction of great buildings and other purposes.

The most conspicuous example of these "air rights" is that of the Grand Central Terminal of the New York Central Railroad in the City of New York. There you have observed the use of the subsurface by the railroad for its vast network of tracks and platforms while on the surface is that great thoroughfare, Park Avenue, with all of the cross streets, abutted on either side by those towering apartment buildings and hotels. In the City of Chicago we have just closed a lease whereby Marshall Field and Company has acquired the air rights over a yard of the North Western Railway. A warehouse costing many millions of dollars is to be erected on piers above the surface without interfering with the free use of its yard by the Railway Company. This is a comparatively new practice, but as our cities become more congested it will inevitably become very common. I predict that on top of these large warehouses there will be established air ports for the use of airplanes. Thus, land which was formerly devoted to one purpose is now used for many. The legal rights of the several owners of these properties on different levels are sometimes difficult to define and open a new and interesting field for the ingenuity of the lawyer.

It would be futile to attempt to forecast what the future development may be. Who can predict the size or navigating range of the air craft of tomorrow, the possibilities of the uses of the gas engine, the ultimate adaptability of electric energy? Judging from what we already have, is it foolish to expect that we shall soon be able to communicate with any one anywhere in the civilized world by a simple attachment we may carry in our pockets? A few days ago a friend living in Chicago told me that the previous evening he had talked by radio to his son who was then on MacMillan's exploration ship in Baffin's Bay, nearly 1,800 miles distant.

The development in transportation and communication that has been accomplished in the past few years has obtained more publicity and is consequently better generally known than what has been going on in other activities during the same period, but the inventors and the scientists have been equally busy in other fields.

One's mind cannot grasp, much less comprehend even a small part of what is constantly going on about us.

In our industrial life the last thirty years may be termed the age of the "big unit." Commencing with the amalgamation of its constituent companies into the United States Steel Corporation, competition and economy have made necessary the creation of big units in almost every industry and business.

I cannot take the time to mention all of these great combinations but because it is the last and one of the most important of all, I shall refer briefly to the General Motors. This Corporation is organized along the lines of the most modern plans of corporate organization and industrial management. Its corporate structure is divided into forty-seven

divisions. In the short time of its existence it has become one of the greatest exporters and advertisers of our products abroad. Go wherever you may throughout the world, whether it be to Europe, Africa, South America, or to the Orient, and you will see being unloaded upon the docks of the important seaports the product of this corporation. It is today conceded to be the leader of American industry engaged in world-wide distribution. The value of its exports for the year 1926 was approximately \$100,000,000. Just now this one corporation seems to dominate the automobile industry as the United States Steel Corporation does the steel business.

Its officers seem to have solved that always difficult industrial problem of the proper relation between the maximum of economical production and distribution.

The General Motors has more than 160,000 employees; the United States Steel Corporation has 250,000; the Pennsylvania Railroad Company 214,000, and the American Telephone and Telegraph Company 293,000.

Disregarding those who have made millions in its stock, the General Motors has probably made more millionaires of those engaged in the operation of its property than any institution ever organized. In concluding a recent article on the subject of the General Motors, Mr. Puckette, the writer, said:

United States oil may be burned in lamps in Mongolia, its steel may be used in construction in every country, its sewing machines in homes and its harvesting machinery in fields the world over, but the American automobile carries the message of the industry of this nation in a way that no other product can. The motor car is a mobile advertisement of itself and its maker: . . .

The speed with which this vast corporation making vehicles for speed, has expanded its operations has established new records in industry. Yet with all its weight and momentum, its pace has not been so remarkable as the control exerted over its progress.

I mention these facts about the General Motors, not that I would advertise that Company,—I am neither its attorney nor a stockholder. I bring them to your attention as typical and as illustrating what has been done and is being done in industries.

Obviously the work not only of creating the structures by which these vast enterprises function, but the preservation of their private rights and their relation to governments, municipal, state and federal, domestic and foreign, must be that of the lawyer.

Step by step with the growth and development of industries has been the increase in volume and importance of commerce and trade, with all of the resultant complications and legal problems.

Again, all of these enterprises must be financed. The bankers must have the opinion of lawyers as to the titles to the property and as to the legality of the corporate entities. There must be prepared the securities which shall be sound and marketable. This also is the lawyer's job.

There are other vast fields, such as trust companies, insurance companies and investment trusts, which require the lawyer's services. I might enumerate indefinitely the activities of these busy times, but I submit I have given enough to enable any one to appreciate that the responsibilities of the lawyer are ever increasing, ever changing.

This country, because of its great variety of climate and diversity of natural resources, plus the stability of our government and the industry of our

people, has been for several years the most prosperous of all the nations.

A recent report of the Bureau of Internal Revenue shows that the income tax from corporations during 1926 exceeded that of the previous year by more than \$200,000,000. This represents an increase in the net corporate income for 1926 of at least 20 per cent over the previous year. There is no evidence of any decline for the year 1927. Prices on commodities have declined during this year yet, instead of having a disastrous effect upon profits, these declines have materially increased the consumption of our people.

The National Industrial Conference Board estimates that during the last 18 months the purchasing power of the dollar has increased approximately 6 per cent, and that at the present prices the dollar, measured by "living cost" is worth 61.7 cents as compared with the 1914 dollar. This situation is very encouraging when it is remembered that when measured by the 1914 standards the dollar shrank to a value of 48.9 cents in July of 1920. The same Board states that the employment index, which showed a slight decline during June, 1927, revealed no recession exceeding 5 per cent in degree as compared with the beginning of the year 1926. The Honorable Herbert Hoover, Secretary of Commerce, in a recent interview, stated that while employment may have declined in some lines, there had been a notable increase in others.

Therefore it may be concluded that the decline in prices and the increase in the purchasing power of the dollar have caused no decline in corporate profits and no material reduction in the level of employment. All of which is proof of an encouraging business outlook and indicates the general enduring prosperity of our country. Especially does it indicate that the demand for the services of competent lawyers is continuously growing.

Never in the history of the world have the requirements for the successful practice of the law been so exacting. With the constantly increasing complexity of our governmental machinery and the creation of bureaus and commissions to perform the various functions of the government, the preparation of the lawyer of today to do the work required of him never ends. He must not only be more familiar with the general principles applicable to the business of the client than is the client himself, but, in addition, he must bring to the solution of the problem with which he is confronted a broad general knowledge of what is going on in business, politics and finance, not only in his own country but throughout the world.

Lawyers are frequently selected as chief executives of a great industry or business. Conspicuous among many, I may mention the late Judge Gary, head of the Steel Corporation; the Honorable Owen D. Young, Chairman of the Board of the General Electric Company; Mr. Jackson Reynolds, President of the First National Bank of New York, the stock of which is now selling for \$3,900 a share; Dwight Morrow, partner of J. P. Morgan and Company; Charles A. Peabody, President of the Mutual Life Insurance Company of New York; Robert S. Lovett, Chairman of the Board of the Union Pacific; Hale Holden, President of the Burlington System; Charles Donnelly, President of the Northern Pacific; Mr. Fred W. Sargent, President of the

Chicago & North Western, and many others I have not the time to mention.

Why are lawyers chosen for these great responsibilities? Is it not because they have greater knowledge of government and of laws, they have minds trained and disciplined to think accurately and clearly, the capacity to reason dispassionately, to see things objectively rather than subjectively, the will to distinguish between right and wrong and the facility to express their thoughts?

The practice of the law necessarily involves a combination of the intellectual with the practical. The successful lawyer must be intellectual in order that his knowledge may be continuously increased and his view broadened. And yet, however erudite he may become, he will accomplish little if he is not able quickly to apply his fund of information to the practical solution of the problems which are his to solve.

The lawyer always has held and always will continue to hold a high place and to exert a commanding influence in the community in which he lives. DeTocqueville well said: "The people in democratic states do not distrust the members of the legal profession, because it is well known that they are interested in serving the popular cause; and it listens to them without irritation because it does not attribute to them any sinister designs."

I deny the assertions of the critics who say that the Bar is losing its influence or that the changing conditions which have made necessary the familiarity of the lawyer with the problems of business have made him any less a careful student of the law or a poorer citizen. He must know more law, more business, more politics and more about what is going on in the world than did the old time lawyer.

It is true that no single lawyer can economically cover the broad field required by present day conditions. In law, as in business, the tendency is toward larger partnerships with corps of assistants.

Necessarily, in the interest of economy both of time and of money the business of these large firms is divided among specialists who are particularly familiar with the branch or subject in which they have specialized. This specialist or expert must be generally well qualified as a lawyer, but by reason of long experience in the particular branch to which he gives the most of his time, he is an expert in that branch. For example, a lawyer who has become an expert in interstate commerce has had little time to keep up with all the latest laws and decisions respecting personal injuries. The man who has made a specialty of real estate law is not so expert in the organization of corporations. Thus, the specialist can do the client's business in his specialty much more expeditiously and economically than one who has to examine the authorities and search for the law that the expert already knows.

Clients are not now content, as they were in the olden days, to wait a week or even days for the lawyers to do the work required. They want speed, —immediate but accurate results. I sometimes think that some clients who state what they want today expect the lawyer to have it done yesterday!!

Yet speed does not mean mistakes or inaccuracy. You remember the old saying that the doc-

tor's mistakes are often buried with the corpse, while the lawyer's stand out in enduring print.

The lawyer's responsibility does not end in the service of his clients. He has a higher duty, a greater responsibility, his obligation to society and to the state. The lawyer has always taken an active part in governmental affairs. It is his duty and I may say his pleasure to try and bring about the selection of the best man for public office. Sometimes he is so solicitous in that behalf that he offers himself as a sacrifice! Obviously, he is particularly interested in the selection of the judges who are to sit upon the bench. In some places there are groups of lawyers who devote much time and effort to that subject. The Chicago Bar Association, for example, has a committee on candidates, composed of ex-presidents of the Association, who pass upon and make known to the Bar and to the public the eligibility and qualifications of all candidates for judicial office in our busy city and county. Their recommendations, while not always followed by the politicians or the voters, nevertheless, have a very persuasive and salutary influence.

Perhaps a more thorough and more satisfactory investigation of the qualifications of candidates for judicial office is the system practiced by the Los Angeles Bar Association with which many of you are familiar.

The Honorable John W. Davis, late Ambassador to the Court of St. James, in his address as President of the American Bar Association in 1923, said:

"Financiers may exorcise the demon of a debased currency that tortures half the world; economists may teach men once again the inexorable laws of commerce and of trade; diplomats with infinite effort may quench the smoldering fires of international hate and discord; but none of these, nor all of these together, can put the world to rights if the streams of human justice do not run clear and strong."

In his address to the American Bar Association as its President in 1916, that lawyer, statesman and diplomat, the Honorable Elihu Root, said:

"Can we satisfy our patriotism and be content with our service to our country by devoting all our learning and experience and knowledge of the working of the law and of our institutions solely to the benefit of individual clients in particular cases? . . . Have we never really cared about law and justice, except as available instruments to get particular clients out of trouble? Is the Bar doing its duty and playing its part in the development of the law? As a rule, the leaders of the Bar devote themselves to their individual practice. As a rule the younger and least experienced lawyers make up the state legislatures. There are exceptions, but that is the rule. Even in the National Congress, although the average of ability and strength is much higher than the public seems to suppose, comparatively few lawyers of the first order make their appearance."

And again at the Conference of Bar Associations in Washington in 1922, Senator Root said:

"Not only has the practice of the law become complicated, but the development of the law has become difficult. New conditions of life surround us: capital and labor, machinery and transportation, social and economic questions of the greatest, most vital interest and importance, the effects of taxation, the social structure, justice to the poor and justice to the rich—a vast array of difficult and complicated questions that somebody has got to solve, or we here in this country will suffer as the poor creatures in Russia are suffering because of a violation of economic law, whose decrees are inexorable and cruel. Somebody has got to solve these questions. How are they to be solved? I am sure all hope they will be solved by the application to the new conditions of the old principles of justice out of which grew our institutions. But to do that you must have somebody who understands those principles, their history, their reason, their spirit, their

capacity for extension, and their right application. Who is to have that? Who but the Bar?"

Few lawyers will frankly admit that they fail to measure up to the standards required of them as lawyers or as citizens. In self-defence they deny that they fall short of the ideal specifications. Yet no lawyer with a proper appreciation of his duty and responsibility to society can deny that in many respects he could do better.

In addition to our domestic problems the difficulties of the peoples of the several nations to adjust themselves to changed boundaries, to new forms of government and new economic ideas as the result of the war, present for solution problems which should engage the best thought and efforts of the lawyers of every country for a long time to come.

There is every indication that as time goes on the problems of society will become more and more complex and that the lawyer's field of activity and usefulness will constantly grow broader and his responsibility greater.

The world looks to the United States for constructive leadership. The responsibility of that leadership is upon the Bar. The Bar is expected to take the forward steps in our material as well as our cultural advancement. Culture as I understand it does not mean the cultivation of an effete complacency, a snobbish aloofness, a superiority complex. It means the ability to observe, the willingness to sympathize, the desire to improve, the capacity to accomplish.

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# AMENDMENT VS. REVOLUTION: CHANGING CUBA'S CONSTITUTION

Important Changes Affecting Whole Administrative Structure of Government to Be Considered at Constitutional Convention in February, 1928—Proposed Amendment Lengthens Presidential Term to Six Years and Forbids Anyone to Hold This Office for Two Successive Periods—Abolition of Vice-Presidency—Succession to Presidency—Proposed Increase of Terms of Senators and Congressmen—Woman's Suffrage—Other Proposals

By GORDON IRELAND, A. M., J. S. D.

THE newest but one of the twenty Iberian sisters<sup>1</sup> to the south of us, always our favorite, so much younger than our precepts and admonition have at times seemed those of an uncle rather than a brother, restless now and again over the memory of the leading-string she thinks is still there, has at twenty-five come to a most interesting change in her manner of life that has attracted not nearly the attention it deserves from her former tutor and still potential guardian.

Outside of the State Department and the White House, very few persons in the United States appear to be aware that Cuba, having just celebrated the "Silver Anniversary" of the setting up of the Republic,<sup>2</sup> is in the midst of adopting Constitutional amendments of so fundamental a character that if they are approved by next February's Convention, the whole administrative structure of the Government will be altered. Not only is the situation of real importance for Cuba herself, but the measure of success she attains in the improvement she seeks may well offer an interesting example for the solution of the problems of some of her earnest but occasionally over-energetic elder sisters.

In Cuba, politics is almost a distinct profession: not only do the lawyers who go in for it—and most of them do, first or last—allow their professional life, in all important matters, to be controlled by their political hopes and plans, but groups of other professions, businesses, localities, or even persons sharing the same Christian name, are constantly forming and announcing themselves "Pro" this man or that; doctors who would be glad of appointments to Hospital or Board of Health positions, Engineers and Architects, Contractors and Labor Unions with a hopeful eye on Public Works and quite generally without being finicky for any Government place or contract in sight. Moreover, as is said of Tammany, they are on the job all the year round. It is almost literally true that no sooner is an election held and the inevitable claims of fraud and more or less serious threats of contests disposed of, than candidates proclaim themselves to succeed at the end of their term the persons just chosen; and Committees start, at least nominally, to round up votes for the next election.

Happily, the people are showing themselves increasingly weary of this perpetual agitation not only for the local Town, City and Provincial offices,

but for Congress as well and, of late, even for the Chief Magistracy itself, immeasurably beyond everything else in the Republic, in power and importance. As has been recently concisely pointed out afresh,<sup>3</sup> every Presidential election has been a period of stress, confusion and danger for the country; and the problem of whether or not the incumbent, running again, has been re-elected, and how, has produced the only two revolutions the Republic has known, and much minor turmoil and further possibilities of disaster. A few statesmen, or at any rate more enlightened or far-seeing of the political leaders, perceived from the outset the dynamite in the re-election problem, very much as did some of our own forefathers in their Constitution-making days.<sup>4</sup> There were frequent public addresses and magazine articles which touched the matter; but more or less complete bills or legislative proposals failed in 1917, 1921 and 1925; and nothing new seemed seriously in hand until the advent of the present Administration.<sup>4</sup>

Among the campaign promises of the Machado party had been the ridding of the country of unnecessary and constant political agitation. Accordingly, following their success, during the first two years of the Presidential Term one saw reports from time to time in the press of a speech by this Governor or that Congressman, this Mayor or that local Liberal leader, in which it was suggested that the President and Congress would presently seek some way of making elections come with less disturbing frequency to the country; and perhaps even, after the end of the present term, settling the Presidential re-election problem. So matters appeared to drift with no authoritative announcement, and no definite plan publicly proposed, but with the apparent feeling that legislation putting all elections into the even-numbered (present Presidential and Congressional) years only, and prohibiting more than one re-election (i. e., 8 years of service) to a President, would be about what should be done; when suddenly, in March, 1927, after some renomination talk had begun to be heard, though the Presidential term was not yet half over, the recognized Govern-

2. A History of the Cuban Republic. Charles E. Chapman, New York, 1927, pp. 315, 346, 483, etc.

3. See for example, *The Tradition Against the Third Term*; John B. Mc Master, *Atlantic Monthly*, Sept., 1927, pp. 380, et alia.

4. General Gerardo Machado took office as President on May 20th, 1925, having been elected on Nov. 1st, 1924, with one half (64) of the lower House for a four year term. The term of Senators is eight years, one half (12) expiring each four years.

1. Twenty-five years, May 20, 1903-1927.

ment leader of the lower House introduced a bill which startled tremendously the public and the politicians who had not been aware of what was actually brewing.

This bill proposed to amend the Cuban Constitution to make the Presidential Term six years, with prohibition of consecutive reelection, elect Senators for 12 years and Representatives for 6, abolish the Vice-Presidency and establish Cabinet succession, give suffrage to women, and make a Federal District out of Havana, the National Capital; with provisions for keeping the actual President and Congressmen in office for the length of new terms, and a careful relementation for first elections under the new plan. A word as to the three minor positive proposals is necessary. In the past the Vice-Presidency, as is not altogether unknown in other constituencies, has been frequently the reward of a minority faction in the nominating councils of the party, though in it the unsuccessful contender for the chief prize usually finds himself without much influence or patronage, the holder of a disappointingly empty honor. On the other hand, the supporters of the winner can hardly contemplate with calm the possibility, however remote, that their whole structure of office and perquisites may fall before its time and be destroyed with the loss of one mortal; and the obvious remedy of putting the succession frankly in his, or their, own hands, is most attractive. A small group of Club women have for a number of years been claiming and mildly working for votes for women in Cuba, with somewhat increasing numbers of late years, and an occasional hearing or support from masculine leaders, from true conviction or as campaign material. The project of a Federal District, after the fashion of the United States or Mexico, had been infrequently mentioned, in connection with Havana City financial difficulties, especially as to water supply and police pay, as to which latter the State almost every month has to contribute one-half under a theory of eventual reimbursement; but this talk had never apparently come to anything serious. At the election of November, 1926, the existing Liberal administration of the City, supposedly favorable to and supported by the National government, was defeated after a close and exciting poll; and the young opposition candidate, whom the National administration promptly took to its bosom with great expressions of joy, began throwing out the office-holders of vanquished affiliations, and weekly exposing new scandals of non-enforcement of law and tax license and bureau grafting of almost every conceivable kind and degree. The greater party authorities thereupon apparently became convinced that such a situation must not be allowed to grow up again, affecting immediately a tenth of the population of the Republic and under the eyes of nine-tenths of the visitors who see no more of Cuba than her chief city.

The ways appear to have been well prepared, for notwithstanding the audacity of some of the proposals, the bill as introduced was passed with only perfunctory debate<sup>6</sup> by the House, and sent over to the Senate for consideration. It appears to be universally agreed that the proposal would have had no better fate than its three predecessors without the frank sugar-coating of material extension in office for the incumbent Congressmen, of both

houses, whose approval was necessary to give it the first possibility of life: but even so, the length of the self-perpetuation made the public gasp, and the opposition asked openly if continuance out of power for such a period were not too high a price to pay for the conceded ultimate good of definite settlement of the re-election problem.

So earnest was the feeling among the students of the University of Havana not only in the School of Law, but those of Medicine, Pharmacy and Arts and Sciences, a sizeable portion of each evidently expecting themselves to be in politics before 12 or even 6 years had passed, that after one or two supposedly forbidden meetings and parades, perhaps "accelerated" somewhat by professional politicians with personal axes to grind, the entire student body and some of the Professors were virtually locked out, and the University remained closed until July, 1927, with resultant ruin and loss of the courses and examinations for the then current term of the academic year.

By the Constitution, the period for which Congress had been elected expired, and a new Congress came into existence on the first Monday of April (April 4, 1927): but the question of whether the project as passed by the House was before the new Senate appeared not to be given any consideration in the parliamentary tactics when it was actually ready to be dealt with in the upper house and in the event would seem to have become unimportant. After inconsiderable public debate, the measure was amended, principally to make the proposed new terms for Senators 9 years instead of the 12 against which the public storm had appeared chiefly directed, and putting the prickly woman suffrage question back on Congress by permitting it "under a law to be enacted," and passed by the Senate.<sup>7</sup> Within a week it had been accepted, with ineffectual protests against the "steam-roller," by the House, and signed by the President. With this brief view of the coming into prospective being of what is in truth a state revolution by a measure of law without precedent in Latin-American constitutional history, we may see what it is that is actually before the Cuban people for decision this coming December.

The present Constitution of Cuba provides<sup>8</sup> that it may be amended only (a) upon two-thirds vote of the total members of each House followed (b) after six months by approval by a Constitutional Convention (which can only approve or reject in toto the proposed amendments as they come from Congress) composed of Delegates elected by Provinces to the number of one for each 50,000 inhabitants, in accordance with procedure to be established by law in the appropriate case. Accordingly the Reform Project<sup>9</sup> as it comes from Congress consists of two parts: the actual Constitutional Amendments to be voted on as a whole verbatim by the Convention, and the necessary legislation for getting that Convention into action. This latter portion, as a matter purely of domestic procedure, need not here concern us further: after noting that Delegates are to be elected directly by the voters under existing suffrage provisions, and the existing Electoral Code for general elections, modified as

6. On June 14th, 1927, by a vote of 18 to 2. The House passed the new measure on June 20th, 1927 by a vote of 96 to 8; and the President approved it on June 21st, 1927. It was published in the Official Gazette (Ext. Ed. No. 7) the same day.

7. Title XIV, Article 115.

8. Now known generally in Cuba as the "Prerogative Law."

9. On March 20th, 1927, by a vote of 94 to 2.

circumstances require: the Convention must meet within 50 days (before February 10, 1928) after six months (December 21, 1927) from the passage of the Project (June 21, 1927); a majority of all Delegates (probably from 60 to 75 will be elected) will form a quorum for business, a majority of those present will decide a vote, a Delegate gets \$30 for each session he attends (but not more than one a day) and the Convention may not last over 60 days. At the end of the Project as Congress passed it in a single Act, the Convention provisions following immediately upon the proposed amendments, occurs the usual legislative provision "This Law shall take effect upon its publication in the Official Gazette"; and the President adds, over his signature "Wherefore, I give my approval to the foregoing Resolution, and order that it be complied with and carried out in all respects." There is nothing said in the existing Constitution about any necessity of the President's approving or otherwise dealing in any way with Amendments "Resolved" by Congress: but so much of the present Project as arranges for the Convention is undoubtedly a Law, requiring the President's approval; and although the inartistic form of the legislative act threw the Amendments into the same basket, there is little doubt in view of the easy working majority and Legislative support of the Executive power, that the situation is to be legally accepted and actually interpreted without complications.

The Amendments in the Project themselves fall into two groups: those of substance, changing the existing provisions where reform is sought; and the transient ones, for getting the new system under way, if adopted.

### A. The Presidency

The term is to be for six years (instead of four, as at present) and "no one may discharge the duties of President in two successive periods" in place of the present provision that "no one may be president in three consecutive periods."<sup>10</sup> The careful wording of the new provision would seem to obviate any discussion, such as the United States has known, as to whether a Vice-President finishing out the term of a deceased President is President, or only acting as such; and if he be elected President, whether it is his first term or his second. Here, any successor discharging the duties is ineligible for the following elective term: and under the careful language, "in" two periods, we must conclude that a President or a successor who had resigned or otherwise got out of office so that he was not actually discharging the duties of President at the appointed end of the elective term, would still be ineligible for the next period: a point of more than academic interest, in view of the scheme of resignation to become eligible as a candidate actually tried out in one or more of the Latin Republics. The President (Machado) elected November 1, 1924, is to go out of office May 20, 1931, be ineligible for re-election in 1930,<sup>11</sup> and be a Senator for six years. Presidents are to be elected in 1930, 1936, 1942, 1948 and regularly each 6 years thereafter.<sup>12</sup> The President is given authority to "initiate legislation," by a Message;

which initiative is now expressed only to be in Congress.<sup>13</sup>

### B. Succession to the Presidency

The Vice-Presidency is abolished,<sup>14</sup> and the present incumbent, Don Carlos de la Rosa, a thoroughly correct and estimable but politically nearly negligible elderly gentleman, is to go out of office on May 20, 1929<sup>15</sup> and be a Senator for six years thereafter.

In case of temporary or permanent lack of a President, the office is to be assumed temporarily by the Secretary of State, other Cabinet Secretaries in order of seniority of their Departments as determined by law, and then the President of the Supreme Court, or the other Magistrates of that Court, in order of age.<sup>16</sup> Such substitute must be qualified to be President: i. e., be a native Cuban or, if naturalized, a veteran, and forty years of age.<sup>17</sup> If the vacancy is temporary, only, the substitute is apparently to hold until the elected President resumes office. If the vacancy is permanent, a Presidential election must be called, to be held within 60 days, at which the acting substitute is ineligible, and the victor in which will hold office for the current unexpired term if the vacancy occurred in the first five years of a term; and for the remainder of that term and the whole of another complete term of six years, if the vacancy occurred in the last year of a term.<sup>18</sup>

Besides the careful provisions for substitution in the new Title VIII of the Constitution, just discussed, there appears in another place a separate paragraph by which to the enumerated powers of Congress is added that of "Designating by a special law, who ought to occupy the Presidency of the Republic in case the President should be removed die, resign or incapacitate himself."<sup>19</sup> But in view of the general eligibility requirement already in force (See Note 17 and text, above) and the very definite requirements of the new Articles 72 and 73, the new "special law," inferior to and therefore incapable of modifying anything in the Constitution, would seemingly be confined, if indeed competent even for that purpose, to designating the order in which the other nine Cabinet officers should follow the Secretary of State.

### C. Congress

The Senate is to be composed of 6 Senators for each Province (of the six) elected for 9 years, instead of four Senators for each Province elected for 8 years, as at present;<sup>20</sup> each President is to be a Senator for 6 years, following his Presidential term; and minority party representation is to be assured (as it is in the lower House, only, at present).<sup>21</sup> The Senate is to elect its own President, (as a permanent official), and he will be President of any joint session of Congress (but not in the line of succession to the Presidency of the Republic).<sup>22</sup> Senators elected November 1, 1920, are to go out of office the first Monday of April, 1931; and those elected Nov. 1, 1924, on the first Monday of April, 1935. Senators are to be elected, in 1930, 18 for 9 years and

9. General Provisions, Sixth. Italics are the present author's.

10. Constitution, Art. 66. Project, Art. 12.

11. Project, Art. 17, Transitory Provisions 3 (a) and 4.

12. Project, Art. 17, Trans. Provns. 3 (a), 8, 10, 12 and 14.

13. Constitution, Art. 61. Project, Art. 11.

14. Constitution, Title VIII, Arts. 73-74. Project, Art. 13.

15. Project, Art. 17. Trans. Provns. 3 and 4.

16. Project, Art. 13; Constitution, Arts. 72, 73.

17. Constitution, Art. 65.

18. Project, Art. 13; Constitution, Art. 74.

19. Constitution, Art. 59 (13). Project, Art. 10.

20. Constitution, Art. 45. Project, Art. 5.

21. Constitution, Art. 29. Project, Art. 3.

22. Constitution, Arts. 56, 58. Project, Arts. 8, 9.

6 for 4 years, to be decided by lot in the Senate after election; in 1934, 18 for 8 years; in 1939 and 1942, 1948 and 1951, and each nine years respectively thereafter, 18, or one-half of the Senate, for 9 years each.<sup>23</sup>

The House of Representatives is to be composed of one Representative for each 25,000 (or major fraction) inhabitants, as now; but elected for 6 years instead of 4, as at present<sup>24</sup>; and when the House reaches 128 members (its present number) it is not to be increased except at the rate of one for each 50,000 inhabitants, a new and somewhat ambiguous provision, which a material increase of population not at present in sight will alone make of practical importance. Representatives elected Nov. 1, 1924, are to go out of office the first Monday of April, 1931, and those elected Nov. 1, 1926, on the first Monday of April, 1933. Representatives are to be elected in 1930, for 6 years; in 1932, for 7 years, in 1939 for 6 years, and in 1942, 1945, and regularly thereafter, for 6 years, one-half each time<sup>25</sup>. Elections are to be held every three years (instead of every year, as they now may be), next in 1930 and regularly in and after 1951<sup>26</sup>; and various shifts and provisions are made for the terms and elections of Provincial Governors and Councillors, Municipal Mayors and Councillors, and members of Boards of Education, to fall within the proper times.<sup>27</sup>

A cheerful nullification scheme dating back to 1904 and known as the "Quorum Dolz" is abolished by the one remaining proposal affecting Congress. The Constitution then, as now, of course, required a two-third attendance of the total membership of each house, as a quorum for commencing a session, and a majority of all its members, for continuing business. When the then Government found itself unable to do anything because the minority of over one-third absented themselves and prevented a quorum, an administration Senator named Dolz after several months' deadlock suggested that the Constitution meant only that the two-thirds must be present at the beginning of a legislature (as had in fact then happened) and thereafter a majority could work. Not only did the Palma Government acclaim delightedly this learned discovery, but the solution has been a precedent of joyous memory to every Government since. The bright tones of fiction are sadly dulled by the new provision, which says in recognition of practical facts that neither House "may commence nor continue its sessions without the presence of a clear majority of its total membership."<sup>28</sup>

#### D. Woman Suffrage

The new provision is that "Laws shall determine the occasion, degree and form in which Cuban women may exercise the right of suffrage. Such Laws must be agreed to by two-thirds parts of the total membership of the House and the Senate."<sup>29</sup> The women's campaign, therefore, is still to be directed at Congress; and the question is re-

moved as an issue from the approaching election of Delegates to the Constitutional Convention.

#### E. Federal District

The new provisions contemplate in the province of Havana a "Central District" to be made up of not more than three Municipalities (Havana and its two most important suburbs) with a form of government to be determined by Law: to take effect February 24, 1931.<sup>30</sup> As a support winner merely, probably, for there has been no demand for or discussion of such a scheme, permission is given for the establishment of a similar Provincial District in the Capital of each of the other five Provinces, taxes to be paid as at present; but it is unlikely that Congress would sanction by the necessary Law such other extraordinary units, at least until it has been seen how the Central District works.

#### F. Isle of Pines

The ratification, even after twenty years' struggle, by the Senate of the United States of the Treaty recognizing the Isle of Pines to be wholly within Cuban sovereignty and jurisdiction has been a source of satisfaction and no little pride to the whole Cuban people; and a note of the feeling of triumph is seen in the taking opportunity on this Constitution-amending occasion to include the Island specifically within the Territory of the Republic as defined in the Constitution<sup>31</sup>; as who should say "Now talk any longer about taking it out of there, if you can."

#### G. Supreme Court Jurisdiction

The Government has from time to time found itself somewhat hampered, in the existing order of things, in getting permanently rid of Judges and other functionaries connected with the administration of justice whose continuance in office is bad for the service in one way or another. To make some final decision at least theoretically attainable it has embraced the occasion to put in a new article bestowing original jurisdiction in such cases upon the Supreme Court of the Republic<sup>32</sup>.

#### H. Constitutional Guarantees

The Constitution at present includes, among other rights of a citizen which may not be suspended, that of Petition to the Authorities, which petitions shall be considered, and the decisions communicated to the Petitioners. The new plan for some reason not yet fully clear, abolishes the Constitutional guarantee on this point, but establishes a new one as to the right to meet peacefully, without arms, and to associate for all lawful ends.<sup>33</sup> The change probably reaches some political organizations, but has aroused no general protest, nor apparently, widespread interest.

#### I. Constitutional Amendments

The reader who has had sufficient thoughtful interest to stay with the discussion thus far may very well (with another analogy perhaps, in mind) be asking "But if they can amend an extension of their own terms and prohibition of re-election into the Constitution so easily this year, why can't they do it, again, or amend it all out again, after another

23. Project, Art. 17, Trans. Provns. 3 (b), (c), 5, 7, 9, 10, 12 and 13.

24. Constitution, Art. 48. Project, Art. 6.

25. Project, Art. 17, Trans. Provns. 3 (d), (e), 5, 6, 8, 10, 11 and 12.

26. Project, Art. 12; Constitution, Art. 75. Project, Art. 17, Trans. Provns. 1 and 14.

27. Project, Art. 17, Trans. Provns. 3 (f) (g) 6, 9, 11 and 13.

28. Constitution, Art. 54. Projects, Art. 7, Cf. Chapman op. cit. p. 171.

29. Constitution, Art. 38. Project, Art. 2.

30. Constitution, Art. 91. Project, Arts. 15, 17 Trans. Provns. 15.

31. Constitution, Art. 2. Project, Art. 1.

32. Constitution, Art. 83 (5). Project, Art. 14.

33. Constitution, Art. 40, Project, Art. 4.

year or two?" And the same question evidently occurred to the legislative leaders: for they have included a stiffening of the amending process itself—which may or may not be some source of difficulty and regret to them as the years go by. At any rate, as has already been pointed out more than once, it goes or falls with the other changes, as a single question: and is therefore in every likelihood of being adopted. The existing provisions for Amendments in general are retained (Cf. Note 7, and text, above) and there is added a paragraph requiring that when any Amendment has directly or indirectly the purpose of continuing in office any elected functionary, for a longer time than that for which he was elected, or the re-election of the President of the Republic, such Amendment must obtain, to be effective, the unanimous approval of the whole membership of each legislative body, approval by three-fourths of the whole number of members of the Constitutional Convention and ratification by favorable vote of three-fourths of all eligible voters in a direct plebiscite of the people; and any Amendment to the foregoing, when adopted, shall meet the same requirements<sup>34</sup>. Evidently, once the Reform gets into the Constitution, it is meant to stick there, if legal foresight can ensure it.

Such is the measure which their leaders have now offered the Cuban people, as a cure for some,

34. Constitution, Title XIV, Art. 115. Project, Art. 16.

at least, of the evils which experience has shown to be most troublesome in their political life. From selfish motives if nothing better, it is well worth the attention of the people and especially the lawyers of the United States, to watch how the new measures may work out, for their one time protégé, and as an example to others: and it is a remarkable tribute to the painstaking and conscientious way in which the original Constitutional Convention did its work that after twenty-five years' trial substantially the only changes now proposed are the steps toward woman suffrage and the Federal District, which approximate actual conditions in the United States; and a change in the Presidential term and eligibility which many thoughtful persons are already maintaining would also be desirable in the larger Republic.

Havana, Cuba, October 10, 1927.

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## AMERICAN LAW INSTITUTE CARRIES ITS WORK DIRECTLY TO BAR

Conference of Co-operating Committees of Bar Associations Held Recently in Chicago Under Auspices of American Law Institute Afforded Lawyers Opportunity to Meet Reporters Who Are at Work on Restatements and Discuss Problems with Them Directly—Williston, Bohlen, Beale and Mechem All Present at Meeting—Michigan Representatives Propose Plan for Annotated State Editions of Restatements

THE recent conference of cooperating committees of Bar Associations and specially invited persons held in Chicago on Oct. 27, 28 and 29, under the auspices of the American Law Institute, represents a new and important extension of the plans of that undertaking. Heretofore the restatements have been carried to the bar chiefly by means of distribution through the Secretaries of various Bar Associations. The Chicago meeting went a step further. It carried not only the restatements but the men who are primarily engaged in making them directly to the Bar and afforded those attending the conference an opportunity for face-to-face discussion on the various problems involved.

The President of the American Law Institute, Hon. George W. Wickersham, and Mr. Mechem, Reporter on Agency, Mr. Williston, Reporter on Contracts, Mr. Bohlen, Reporter on Torts, and Mr. Beale, Reporter on Conflict of Laws, were all present. Several

members of the Council, representatives from the committees of the Bar Associations of various states and cities in the region and a number of invited guests, among them distinguished members of the federal and state judiciary, also attended and took an active part in the proceedings. The meeting was held in Lincoln Hall in the Law Building of Northwestern University and continued for five sessions, concluding with the session of Saturday morning. To an observer it looked like a regular meeting of the American Law Institute itself, though if course on a smaller scale. The general procedure followed that which obtains at the regular annual meeting.

A preliminary statement issued by the American Law Institute stated that the object of the conference was to give members of cooperating committees and others especially invited an opportunity to meet the Reporters on the various subjects undertaken for restate-

ment and to discuss with them any matters concerning the Tentative Drafts of the Restatements of the Law—whether of suggestion for improvement or inquiry—which they desired to bring before the conference; and also to discuss plans for the widest possible distribution and use of the Tentative and Final Drafts of the Restatement. There was also issued a preliminary memorandum setting forth certain matters on which the Reporters themselves particularly wished to take the sense of the Bar at the meeting, thus giving those in attendance an opportunity to give previous consideration to them. For instance, aside from the problems involved in certain sections to which attention was specially called, the Reporter on Agency desired a discussion of the form of the Restatement and in relation thereto an answer to the following questions: Are the statements in the sections too brief or too extended? Are there too many or too few illustrations? Do the readers understand that the illustrations are not always taken from actual cases? Is the Comment too condensed? Does matter appear in the Sections which should go into Comment? The Reporters on Conflict of Law and on Contracts set forth in this memorandum a number of special sections involving problems they desired discussed, and the Reporter on Torts did the same and, in addition, desired an opinion as to the form of the Restatement similar to that asked by the Reporter on Agency.

All these matters were discussed with interest and animation at the sessions in Lincoln Hall, the genuine receptivity of President Wickersham and the Reporters leaving no doubt of their desire to secure firsthand views from the Bench and Bar instead of mere formal acquiescence in the work of the Reporters and the Institute. In addition, other questions were raised from time to time by members and were given due attention, notes being taken of many for further consideration. The business of the conference began with the consideration of the Tentative Drafts 1, 2 and 3 of the Law of Contracts, and the Tentative Drafts of Conflict of Laws, Torts and Agency were taken up at successive meetings. Special interest attached to the discussion of the Tentative Restatement on Contracts, due to the announcement that the Council of the Institute was desirous of considering at its December meeting the advisability of placing a revision of these drafts on Contracts before the meeting of the Institute next spring with a view to having that meeting consider the adoption of the revision as the official Restatement of the Law.

The Michigan representatives presented a resolution suggesting to State Bar Associations that they try, by way of experiment, the preparation and publication of editions of the Restatements embodying local annotations. This was approved by the conference. The resolutions in question further suggested that such annotations should cite all relevant local decisions and statutes and indicate their agreement or disagreement with the rules of law as stated in the Restatement, and also indicate those instances in which there is no local authority; recommended that "the person or persons to prepare such local annotations be chosen by the respective committees on cooperation with the American Law Institute or governing boards of such Associations, and that the work be done under the supervision of these committees with the cooperation and advice of the American Law Institute"; and further recommended that the annotated editions of the Restatements be published by the State Bar Associations, and that copies thereof be

sent without individual expense to all members of such Associations. The resolutions finally urged the various committees on cooperation with the American Law Institute to use diligent efforts to inform the Bar of their respective States concerning the work of the Institute, its progress and its ultimate benefit to the administration of the law.

The committee on cooperation of the Chicago Bar Association, of which William B. Hale is chairman, was active in the preparation for, and the procedure during, the conference. The Chicago Bar Association acted as host to the conference at a dinner on Thursday night, at which President Carl R. Latham presided. He introduced Dean John H. Wigmore, who in turn made a brief address introducing Hon. George W. Wickersham, President of the Institute. Mr. Wickersham spoke of the work of that organization, the imperative necessity for a clarification and simplification of the law, and the great obligation that rested on the legal profession to make the undertaking a success. He pointed out that the work of the Institute must rest, as the common law rested, on the consent of the people. But it must rest in the first place on the free acceptance by the Bench and Bar of the United States.

"And for that reason it is," he continued, "that wherever representatives of the Institute go they invoke the cooperation of the Bench and Bar of America to help make this work what it ought to be. The scholars can give it the first formulation. They alone are capable of doing this great work; but the practicing lawyers throughout the country must give it the criticism which will fit it to the ends which it is meant to serve; and I invoke all of you on their behalf to give your help,—your suggestions, your criticism, whatever it may be,—in making the work as perfect as it should be. It is a great task.

"Now, gentlemen, the time has come—it has always been here, but it is here more insistently today than ever before—when there rests upon the Bar a great obligation and there is presented to it a great opportunity. We must not look to others to do this work. We must do it ourselves and we must make this law of ours which our forefathers brought with them as their dearest heritage to this country—we must make that system appeal to everyone who comes to this land, of whatever race, from whatever clime, as the expression of the conception of justice of honest men of whatever race, and if it is not that, it cannot abide. The legislature will change it, will abolish it, will mutilate it, will perforce repeal it, unless it becomes the expression of the sense of justice of the majority of people throughout the United States."

At the conclusion of President Wickersham's remarks, President Latham announced that the gathering was honored by the presence of the Vice-President of the United States. The Vice-President, however, had insisted that he be not called on for a speech. The mention of Mr. Dawes' name was received with cheers, at which he rose and bowed his acknowledgments. President Latham then introduced Hon. James M. Beck, former Solicitor General of the United States, who delivered an interesting address on "The Sacerdotalism of the Law."

The Chicago Bar Association was also host to the conference at a luncheon on Friday at which Mr. Beale, Reporter on Conflict of Laws, talked interestingly on the work of restating that particular subject.

# ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF THE LAW: A BOOK REVIEW

By W. S. HOLDSWORTH

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ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF THE LAW IN THE UNITED STATES. By John Dickinson. Cambridge: Harvard University Press. 1927. Pp. 403. \$5.00.

THE problem with which this book deals is a very pressing problem both in the United States and in England. The more flexible constitution of England, and the sovereignty of its Legislature, makes it perhaps a less complex problem there than it is in the United States; but in both countries it raises many perplexing issues, because in both the growth of administrative tribunals has made it necessary to face the question how the activities of these tribunals can be reconciled with the continued supremacy of the law. This is the first book which I have seen which treats both scientifically and systematically with this new and difficult subject. The author has brought to bear on his task a knowledge of legal history, of political theories, and of modern law, with the result that he has made a very important contribution to the solution of the problem.

It was during the eighteenth century that the law and government of England, and the law and government of the States of modern Europe, assumed the characteristics which, in spite of revolutions, they retained all through the nineteenth century. It was then that the contrast between the English "rule of law," which the United States inherited and emphasized, and the continental system of administrative law, assumed its classical form. At a time when the states of the continent were under the control of absolute princes, the continental system too often meant that, in the relations between the state and its subjects, there was a great deal of administration and very little law. In England, on the other hand, the power of the crown was so restrained that, so far as the activities of the central government were concerned, there was a great deal of insistence on a supreme law which guaranteed the liberties of the subject, and very little administration.

It has been said that "we are all socialists now"; and this saying embodies the truth that the complex problems of our constantly changing modern society, demand a far greater amount of governmental control, than was needed in the relatively static conditions of the eighteenth century. We must have more departments of the central government; and these departments, if they are to do their work efficiently, must be given a wide discretion and adequate powers to settle the many disputed questions to which the exercise of their powers necessarily gives rise. How is this to be squared with the rule of law? Can the law maintain its supremacy, and yet allow to these administrative

boards the freedom needed for their efficient working?

Some have thought that law courts are fitted only to deal with individuals; that they cannot successfully arbitrate between contending groups; and that, therefore, the task of mediating between these groups is a political task for a political body, and not a legal task for the courts. Mr. Dickinson rejects this view, and, in my opinion, rightly rejects it. As a matter of fact our history shows us that the secret of the success of the English constitution, and of the legal ideas underlying it, upon which the American constitution is based, is the determined and successful effort of the courts to master competing groups, to impose upon them its ideals of justice, and, by so doing, to achieve its own supremacy. A law which asserted its supremacy over the prerogative of kings should not be frightened by a modern group, or trust, or union, or corporation. As Mr. Dickinson very truly says (at p. 215), "If in any field of human relations situations are of frequent occurrence which, unless adjusted, will lead to disputes and disorder, some standardized way of adjusting them—that is some form of adjudication—must be provided, or anarchy accepted as the alternative." The only bodies who can adjust them are the courts because they, by their training and tradition, have learned that it is their duty to administer justice in the interests of the whole community, disregarding the merely sectional interests of any particular group or administrative body within it.

What then should be their method of approach in dealing with these administrative bodies? These bodies are necessary for the well being of modern society. They must be allowed a wide discretion to settle many questions of trade, of police, of public health, which come within their sphere. Their specialist knowledge makes them much better judges of these questions than any court can be. But they ought not to be uncontrolled. That was the vice of the old continental administrative courts, which sapped the supremacy of the law. In fact all administrative tribunals, whether they are the servants of an absolute king or an absolute democracy, will be found to develop very similar vices. They are not careful to observe the boundaries of their authority. They think more of efficiency than of justice to the individual. They develop a technical departmental view which blinds them to the most obvious injustices. The recent case of *The Postmaster-General v. The Corporation of Liverpool* [1923] A.C. 587 is a good English illustration of these failings, and of the service which the courts can do in correcting them. In that case the Postmaster-General tried to recover damages from the Liverpool Corporation for injury to a telephone pipe, although the injury was caused by the

negligence of the predecessors in title of the plaintiff, for which the plaintiff was responsible; and although the defendants had only given the plaintiff's predecessors in title leave to lay the line on condition that the defendants were not to be liable for the damage in respect of which the action was brought. So blinded was the Post Office by its departmental point of view to the obvious injustice of its claim, that, by its counsel, it actually said that, if the court decided against it, legislation might be necessary. On that Lord Birkenhead remarked at p. 598, "I have amused myself by speculating as to the probable ambit [of that legislation]. The first section of such a Bill will, I suppose, provide that when the Postmaster-General by his own negligence occasions damage to a telegraph line other persons (including perhaps the owners) non-contributory to that negligence and damage shall pay for it; and the second, no doubt, will provide that when the Postmaster-General inherits from a company a laid pipe, which neither he nor they could have laid down without the consent of X., the Postmaster-General shall nevertheless be absolved from the condition without which his predecessors in title would never have been allowed by X. to lay a pipe at all." And, on the whole case, Lord Carson said, at p. 602, that the view of the Postmaster-General involved "a boldness and a hardihood of construing the Telegraph act in the support of what was wrong which has seldom been surpassed in a Court of Justice." It is cases of this kind, which can perhaps be paralleled in the United States, that make the preservation of the supremacy of the law an absolute necessity to the maintenance of justice between individuals, and to the preservation of the liberty of the subject.

"Out of the old fields must grow the new corn" was a favorite saying of Coke's. In the early days of the common law local government and local

jurisdiction were administered by amateurs, who combined the functions of adjudication and administration; and, from early days, the common law was brought face to face with guilds and companies and corporations, which exercised large discretions and semi-judicial powers. We must adapt the old methods of control to the new situation; and it is one of the merits of our system of case law that it helps us to do this by keeping the lawyers in touch with the social and economic facts of the day. What our courts did in the days of the great social changes of the Renaissance and the Reformation, our courts are now called on to do in the age of change in which we are now living. We must not allow ourselves to be surpassed by our ancestors. But we should remember that the lawyers of the sixteenth and the seventeenth centuries succeeded in accomplishing their task, because they were men who had other learning besides that of the law. They were men who kept themselves informed as to the problems of their age, and of the solutions proposed for those problems. Not the least valuable part of Mr. Dickinson's book is his concluding chapter, in which he emphasizes the need for a legal education for lawyers which will give them this larger knowledge, if they are to deal successfully with these problems.

I can recommend this book to all students of law and politics who wish to gain a clear knowledge of this most important problem of the modern state. They will find in it a critical analysis of the efforts made to solve it in many fields of administration, and most helpful suggestions as to the way in which principles can be evolved, which will introduce some sort of order into a chaos of scattered precedents.

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## INCORPORATION BY THE UNITED STATES

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AT the present writing, according to the best available information, there are approximately seventy-five United States corporations. This of course does not include the organizations or societies incorporated by act of Congress as District of Columbia corporations. Of the seventy-five corporations now on the books, four are railroad companies, three are canal companies, two navigation companies, and fifteen may be classed as patriotic or war organizations. The remaining number represent a wide range of educational, religious, fraternal, charitable and social organizations, including musical, horticultural and dramatic societies.

As a result of the wide latitude of the precedents established by Congress, every new session witnesses from fifteen to twenty bills introduced, backed by whatever influence the respective organ-

izations can muster, for the incorporation of their society. The principal argument advanced for national incorporation is that it will secure the recipients national prestige and at the same time free them from State restrictions on foreign corporations. There is quoted below from the records of the Judiciary Committee of the House of Representatives, a list of the bills introduced during the 67th Congress, to show the variety and range of these requests for national incorporation. During that Congress petitions for incorporation were received from the following:

American Companies engaged in trade in China.  
American Volunteers in the Canadian Expeditionary Forces.  
Belleau Woods Memorial Association.  
Grand Army of the Republic.

Lighthouses for the Blind.  
 National Federation of Business and Professional Women's Clubs.  
 National Association of American World War Mothers.  
 Phi Beta Sororities.  
 Supreme Rendezvous, Great Order of Knightly Kin.  
 Phi Delta Omega fraternities.  
 Women's Overseas Service League.  
 Home building, and for the appointment of a commissioner of such corporations.  
 National Society of Colonial Daughters of America.  
 American Mathematical Society.  
 American Institute of Accountants.  
 Lake to Hudson Ship Canal Company.  
 National Society of Daughters of the Union.  
 Veterans of Foreign Wars of the United States.  
 World Commerce Corporation.  
 United States Blind Veterans of the World War.

The records show similar lists for the prior and succeeding congresses.

#### Extent of Power to Incorporate

In view of the general belief that the Congress of the United States has an unlimited power of incorporation, and of the repeated demands of organizations of national importance to secure the exercise of this power, it is pertinent to ascertain just what is the extent of the federal government's power with respect to the granting of charters of incorporation. Fortunately, this is not a new question, nor an unsettled one. In the celebrated case of *McCulloch v. Maryland*, 17 U. S., 404, Chief Justice Marshall set forth definitely the extent and limits of the power of the federal government to grant charters, in the following language: (p. 404).

"This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted."

The federal government does not have, then, any inherent power of incorporation because of its sovereignty. Continuing the court said:

"Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described."

"Although, among the enumerated powers of government, we do not find the word 'bank' or 'incorporation' we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. . . . but that instrument (the Constitution) does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers."

The Court, therefore, holds, that under the power granted in the Constitution of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department thereof" that the Congress has the right to grant charters of incorporation "if the existence of such a being be essential to the beneficial exercise" of some

of the great powers delegated by the people to the federal government. The *McCulloch* case has been consistently adhered to by the Supreme Court in its later decisions. In *Luxton v. North River Bride Company*, 153 U. S. 528, after citing the *McCulloch* case with approval, the court says:

"Congress, therefore, may create corporations as appropriate means of executing the powers of government, as for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the States."

(See also *Wilson v. Shaw*, 204 U. S. 34.)

It is, therefore, clear, that Congress may grant charters to organizations designed to carry out some function of the federal government. And, it seems equally clear, that Congress has not the power to grant charters for general purposes, such as to fraternal, professional, educational, religious and similar societies. Especially is this true with reference to religious corporations in view of the express prohibition of the first amendment of the Constitution against the passage of any law respecting the establishment of a religion.

While it does not appear that the Federal courts have ever passed directly on the validity of any such charter, the following language from the *McCulloch* decision, seems to indicate clearly the mind of the court with reference to such an exercise of power by Congress: (p. 422, *supra*.)

"Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land."

#### The General Welfare Clause

But, notwithstanding the limits above described, there are those, including many members of the bar, who take the view that Congress can incorporate any worthy organization under the general welfare clause of the Constitution. Much has been said and written on the scope of this clause of the Constitution. If this view could be maintained, however, this would no longer be a government of enumerated powers with limits firmly set by the Constitution, but a government of unlimited powers, and the Congress of the United States might enact legislation of every sort supported only by its discretion of what it determined to be in the interest of the "general welfare" of the United States. But the courts have held that the general welfare clause is not a grant of power but a mere limitation on the taxing powers of the United States. The clause reads as follows:

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." (Article I, sec. 8 of the Constitution of the U. S.)

Discussing this clause, Mr. Justice Story, in his work on the Constitution, says (p. 907 and 908):

"Before proceeding to consider the nature and extent of the power conferred by this clause, and the reasons on which it is founded, it seems necessary to settle the grammatical construction of the clause, and to ascertain its true reading. Do the words 'to lay and collect taxes, duties, imposts and excises' constitute a distinct, substantial power; and the words 'to pay the debts and provide for the common defense and general welfare of the United States' constitute another distinct and substantial power? Or are the latter words connected with the former, so as to constitute a qualification upon them?"

This has been a topic of political controversy, and has furnished abundant materials for popular declamation and alarm. If the former be the true interpretation, then it is obvious that, under color of the generality of the words 'and provide for the common defense and general welfare' the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers. If the latter be the true construction, then the power of taxation only is given by the clause, and it is limited to objects of a national character, 'to pay the debts and provide for the common defense and the general welfare.' The former opinion has been maintained by some minds of great ingenuity and liberality of views. The latter has been the generally received sense of the nation, and seems supported by reasoning at once solid and impregnable. The reading, therefore, which will be maintained in these commentaries, is that which makes the latter words a qualification of the former; and this will be best illustrated by supplying the words which are necessarily to be understood in this interpretation. They will then stand thus: 'The congress shall have power to lay and collect taxes, duties, imposts, and excises, in order to pay the debts; and to provide for the common defense and general welfare of the United States'; that is, for the purpose of paying the public debts, and providing for the common defense and general welfare of the United States. In this sense, Congress has not an unlimited power of taxation; but it is limited to specific objects—the payment of the public debts, and providing for the common defense and general welfare. A tax, therefore, laid by Congress for neither of these objects, would be unconstitutional, as an excess of its legislative authority."

After quoting the above from Mr. Justice Story's work, with approval, Judge Rogers, in *U. S. v. Boyer*, 85 Federal 430, says:

"After a most elaborate and historical discussion of the subject presenting the different views of the different political schools or parties, he concludes that the 'general welfare' clause 'contains no grant of power whatsoever, but it is a mere expression of the ends and purposes to be effected by the preceding power of taxation'. I content myself with the fact that the former construction has never been sustained by any court, and the reverse has been held so often as not to require citations to support it; while the latter construction rests upon the theory that the 'general welfare' clause contains no power of itself to enact any legislation, but, on the contrary, the words 'and provide for the common defense and general welfare of the United States' according to the most liberal constructionist, is a limitation on the taxing power of the United States, and that only.

"No case has been cited tracing the power to enact any statute to the general welfare clause above quoted, and I do not believe any can be. The learned counsel, in this connection, has cited various acts of Congress of a nature quite similar to the one in question, but no number of statutes or infractions of the Constitution, however numerous, can be permitted to import a power into the Constitution which does not exist, or to furnish a construction not warranted. They, too, must stand or fall, when brought in question, by the same principles which are to be applied alike in all cases."

It will therefore be seen that the general welfare clause is not a grant but a limitation of power, and adds nothing to the power of Congress to grant charters of incorporation.

#### Some Objections to National Incorporation

What is the status of a federal corporation? In the first place, it is immediately exempt from all State taxation, although it has perfect freedom to carry on its activities in every State in the Union. Prior to the act of February 13, 1925, the fact of incorporation by Congress alone was sufficient to give the federal courts jurisdiction over suits arising in connection with any of these corporations, and the federal courts, in many instances overburdened with the enforcement of the myriad of federal laws, would be required to determine the issues of the litigation no matter how far removed they might be from any federal question. (*Knights of Pythias v.*

*Kalinski*, 168 U. S. 289.) Further, the great majority of these corporations are required to make reports to Congress, which is engaged in national legislative problems, and where there is no official charged with the duty of auditing or investigating these reports. Consequently, a charter granted giving wide powers to an organization, we will say for example, for educational purpose, may eventually fall into irresponsible or unpatriotic hands, and the federal government find itself the authority for propaganda or activities that might easily prove inimical to the best interests of the country. If the number of these corporations is increased it will undoubtedly lead to the creation of an additional bureau in Washington for the supervision of the activities of these federal corporations, in spite of the prevailing sentiment in the country against the further increase in the number of government bureaus. It is also well to consider the burden that Congress bears today as the legislature of the nation. With a federal corporation there is no method of amendment of the charter other than by an act of Congress. Hence, Congress has frequently been called upon to lay aside its national duties for the nonce, to pass an amendment to some charter perhaps to change the number of trustees, or the title of the corporation, or the provisions relating to membership qualifications. This amendment must go through the same formalities as any other law and receive the approval of the President, no matter how trifling the change desired may be.

Every new charter adds further impetus to the demands of others for charters. It is surely sound reasoning to maintain that if the "A" society has been "recognized by Congress" then the "B" society which is doing some worthy charitable or other work, is just as deserving of the same recognition. And so, if further grants are made, Congress will find itself engaged in constructing an endless chain of federal corporations.

#### Present Attitude of Congress

The tendency in Congress today, as reflected by the action of the judiciary committees of the House of Representatives and the Senate, is not to grant further federal charters except where found necessary or appropriate to carry out some governmental activity. On March 13, 1922, under Chairman Nelson, the Senate Judiciary Committee adopted the following resolution:

"That it is the sense of this committee that no federal incorporation act should be passed except its purpose is to aid in carrying out some power granted by the Constitution."

This is likewise the policy of the House Judiciary Committee. Under the leadership of Hon. George S. Graham, its chairman, and a distinguished constitutional lawyer, who holds that the federal government is without power to grant charters except to aid in carrying out some constitutional power, no charters for general purposes have been reported to the House.

Unless, therefore, some new and compelling situation arises, warranting a change in this policy and a delegation of further power to the federal government, it seems that the policy of Congress will be to "stand by the ancient landmark which our fathers have set" and in spite of what may be termed some very uncomfortable precedents, deny any further grants of federal charters for general purposes.

\*See also Madison's views in the *Federalist* No. XLI, and the scholarly address of Hon. Henry St. George Tucker in the House of Representatives, January 8, 1884.

# REVIEW OF RECENT SUPREME COURT DECISIONS

State Act Discriminating Against Federal Trial Court Judgments as Against Judgments of State Trial Courts Not Sufficient to Bring Former Judgments Within Operation of Provisions as to Recording, Etc.—Reserving Authority to City Council to Make Exceptions from Building Line Regulation in Zoning Ordinance Held Not Unconstitutional in Certain Cases—Interstate Commerce Commission's Power to Regulate Placing of Cars at Coal Mines—Within Power of State to Impose Highway Maintenance and Repair Tax on Motor Company Engaged Solely in Interstate Commerce—Other Cases

BY EDGAR BRONSON TOLMAN

## Liens—Effect of State Statutes on Federal Court Judgments

The judgment or decree of a federal court will operate as a lien on the property involved from the time of its entry without regard to recording, etc., as required in the case of judgments or decree of state courts, unless the state requirements place the federal judgments and decrees in a status equal to those of the state courts. Placing the judgment of a federal trial court in the same class with judgments of the state appellate courts and thereby discriminating against such trial court judgments as compared with the state's trial court judgments is not sufficient to bring the federal judgments within the operation of the state statute respecting recording, etc.

*Rhea vs. Smith*, Adv. Op., 839; Sup. Ct. Rep. vol. 47, p. 698.

This case involves the validity of a lien of a judgment of the Federal Court for the Western District of Missouri sitting at Joplin upon land in Jasper County in the district of which Joplin is the County seat. It turns upon the question whether the Missouri law, providing for registration, etc., of judgments of the United States Courts to make them liens, conforms to the state law in reference to liens of judgments of state courts of record. If there is conformity the judgment of the Supreme Court of Missouri must be affirmed; otherwise it must be reversed.

The plaintiff, Rhea, sued in a state court in Jasper County, in one count to determine title and in another count to recover possession of the property by ejectment.

Both the plaintiff and defendant claim under a common source of title in one Blanch H. Whitlock who owned the land in question in 1921. At that time she brought a suit in the federal court of Joplin, but on January 10, 1921, it was dismissed and costs adjudged against her in the sum of \$8,890.20. On April 5th she conveyed the property to the defendant, Smith.

Later in 1921 the land was sold to the plaintiff under an execution issued on the judgment for costs which had been entered against Whitlock.

The plaintiff contends that that judgment was a lien on the land and that by virtue of it he acquired title superior to any thereafter conveyed by the judgment debtor. The defendant contends, on the contrary, that in the absence of a transcript of that judgment filed in the office of the clerk of the court in

Jasper County as required by Missouri law the judgment was no lien and hence the conveyance by the judgment debtor was free from the encumbrance.

The state courts upheld the contention of the defendant and held that the federal court judgment constituted no lien on the land. This holding was reversed, however, in the Supreme Court of the United States in an opinion delivered by MR. CHIEF JUSTICE TAFT.

In his opinion he first reviewed the cases holding that Congress has power to make rules governing the enforcement of the judgments and decrees of the federal courts by virtue of its power generally to make laws necessary to carry out its delegated powers.

Next in order was a review of the legislation on the subject. The first statute enacted was that of 1828 providing that writ of execution and other final process issued on judgments of federal courts were to be the same as those prescribed for the state courts, but provided that the judges could, in their discretion, alter final process to conform them to any changes made respecting the state courts.

In 1888 Congress enacted a law requiring clerks of the United States Courts to prepare complete indices to judgments wherever the state required the judgments of its courts to be so indexed, but required no docketing or filing of a transcript of such judgments in any state office.

This was later amended, in 1895, to provide that in order to become a lien no judgment of a United States Court need be filed in a state office in the county where rendered if the Clerk of the United States Court was required by law to have a permanent office and a judgment record open at all times for public inspection. This amendment, however, was repealed, leaving the law as it was under the statute of 1888.

The Missouri statute respecting the indexing, etc., of judgments of its courts was quoted as follows:

"Sec. 1554. Lien of Judgment in Supreme Court, Courts of Appeals, and Federal Courts in This State.—Judgments and decrees obtained in the Supreme Court, in any United States district or circuit court held within this state, in the Kansas City Court of Appeals or the St. Louis Court of Appeals, shall, upon the filing of a transcript thereof in the office of the clerk of any circuit court, be a lien on the real estate of the person against whom such judgment or decree is rendered, situate in the county in which such transcript is filed.

"Sec. 1555. Lien in Courts of Record Generally.—Judgment and decrees rendered by any court of record shall be a lien on the real estate of the person against

whom they are rendered, situate in the county for which the court is held.

"Sec. 1556. The Commencement, Extent, and Duration of Lien.—The lien of a judgment or decree shall extend as well to the real estate acquired after the rendition thereof as to that which was owned when the judgment or decree was rendered. Such liens shall commence on the day of the rendition of the judgment and shall continue for three years, subject to be revived as hereinafter provided; but when two or more judgments or decrees are rendered at the same term, as between the parties entitled to such judgments or decrees, the lien shall commence on the last day of the term at which they are rendered."

The learned Chief Justice then said that the effect of the federal statute of 1888 was to change the existing rule

that Federal court judgments were a lien upon lands throughout the territorial jurisdictions of the respective Federal courts, but intended to do this only in those states which passed laws making the conditions of creation, scope and territorial application of the liens of Federal court judgments the same as state court judgments, so that where any state has not passed such laws, the rule that Federal judgments are liens throughout the territorial jurisdiction of such courts must still be in force.

But it was held that the Missouri statute failed to do this, since it placed the judgments of federal courts of first instance not upon a parity with state courts of first instance, but rather in the status of judgments of the state appellate courts. The disparity between them was thus commented upon in the opinion:

The Missouri Statutes prescribe that judgments rendered by any state court of record shall be a lien on the real estate of the person against whom they are rendered, situate in the county for which the court is held, and the lien shall commence on the day of the rendition of the judgment and shall continue for three years. They further provide that judgments obtained in the Supreme Court of the State, in any Federal court held within the State, and in the Court of Appeals of either Kansas City or St. Louis, shall upon the filing of a transcript in the office of the clerk of any circuit court be a lien on the real estate of the person against whom such judgment or decree is rendered, situate in the county in which such transcript is filed.

It is very clear from this recital that a lien of a judgment of the Federal Court upon lands in the county in which it sits, if we give effect to the state statute, can not be a lien unless a transcript of the judgment shall be made and filed in the office of the clerk of the circuit court of the State in that county, whereas no such transcript of a judgment in the state circuit court is required to create a lien for its judgment, but the lien takes effect the minute that it is entered on its record. Not only is this true with respect to the state circuit court of the county, a court of general jurisdiction, but it is also true of judgments in the county court and in the probate court of that county which are courts of record.

It is obvious, however, that the district court of the United States is a court of first instance of general jurisdiction just as the circuit courts of the various counties in Missouri are courts of general jurisdiction of the first instance. The conformity required should obtain as between them and not as between the Federal court and the state appellate courts.

The necessity for exactness as to determining the priority of liens was urged in answer to the State Court's view that the difference here was too slight to be material:

We are dealing here with a question necessarily of great nicety in determining the effect and the priority of liens upon real estate, and the subject requires exactness. Merely approximate conformity with reference to such a subject matter will not do, especially where complete conformity is entirely possible. The Supreme Court of Missouri in its opinion says it would take but a short time and very little trouble to transcribe a judgment of the Federal court sitting in a county seat and to file it in the office of the clerk of the state circuit court in the same place on the day of its rendition and thus put it on a par with the lien of any judgment of the state circuit

court rendered on the same day. It may be that the transcript of the judgment if properly filed even if the transcribing be delayed, as in usual course it is likely to be for several days, would not prejudice the holder of a judgment in the Federal court, because its lien would date from its rendition in the Federal court. The risk to be run, however, is in the danger that the agent or attorney of a judgment creditor in the Federal court may forget to have the judgment transcribed and filed in the clerk's office of the circuit court of the county. Such forgetfulness by those charged with the duty is a factor to be considered and makes a real difference between the provision for the lien of the Federal court judgment and the instant attaching of a lien upon the entry of the state court judgment without further action.

The opinion concluded with a discussion of the repeal of the amendment of 1895, conceding that even though such repeal indicated an intention on the part of Congress to permit the requirement that there should be some additional record to constitute a federal judgment a lien, still there was no intention indicated to allow inequality, which resulted in the present case.

The case was argued by Mr. Thomas Hackney for the petitioner and by Mr. W. R. Robertson for the respondent.

#### Zoning Ordinances—Building Line—Exception To

A city ordinance fixing a building line at least as far from the street as that occupied by 60% of existing houses in the block, beyond which no building may be erected, but reserving authority in the city council to make exceptions from the operation of the regulation is not unconstitutional as applied to a case where it appears that the council has fairly exercised its discretion respecting a petition for a permit to be exempted.

*Gorieb v. Fox et al.*, Adv. Op. 773; Sup. Ct. Rep., vol. 47, p. 675.

A city ordinance of Roanoke, Virginia, divided the city into "business" and "residential" districts. Another ordinance provided that a set back or building line should be established in relation to the street and that this line should be at least as far from the street as are 60% of the houses on the block. A "block" was defined therein as the area on one side of the street bounded by the intersecting streets nearest to the right and left. This ordinance also provided that no building thereafter erected should extend nearer to the street than the building line, but that the city council should have power reserved to make exceptions to this regulation.

The petitioner in this case sought the council's permit to build a store on the lot adjoining that on which his residence was located. A permit was granted allowing him to build such store, but not less than thirty-four and two-thirds feet from the established building line on the block.

Then the petitioner attempted to mandamus the council to permit him to build up to the building line on the ground that the set-back ordinance was unconstitutional. The state courts upheld the ordinance and the action of the council and the petitioner brought this writ of certiorari.

He contended that the ordinance was unconstitutional because the method of fixing the line was uncertain since the houses were at various distances from the street; because it enabled the council to act arbitrarily; and finally, because it deprived him of the use of his property without due process of law.

All of these contentions were rejected, however, in the Supreme Court of the United States in an opinion delivered by Mr. JUSTICE SUTHERLAND. The first

ground advanced by the petitioner was held untenable for reasons stated as follows:

In the present case this contention may be put aside, since (a) the permit was granted and the building line fixed under the proviso which reserved to the council in appropriate cases authority to fix the building line without reference to this limitation, and (b) as to the existing houses in the block in question, the actual differences in respect of the building lines upon which more than sixty per cent of them stood are so slight as to be entirely negligible upon the question of certainty.

The second contention was held to be without force in view of the facts of this case. That reservation of authority to make exceptions from the rule is not unconstitutional was asserted in the following language of the opinion:

The proviso, under which the council acted, also is attacked as violating the equal protection clause on the ground that such proviso enables the council unfairly to discriminate between lot-owners by fixing unequal distances from the street for the erection of buildings of the same character under like circumstances. We cannot, of course, construe the ordinance as meaning that the power may be thus exerted; nor may we assume in advance that it will be exercised by the council capriciously, arbitrarily, or with inequality. It will be time enough to complain when, if ever, the power shall be thus abused.

The proviso evidently proceeds upon the consideration that an inflexible application of the ordinance may under some circumstances result in unnecessary hardship. In laying down a general rule, such as the one with which we are here concerned, the practical impossibility of anticipating in advance and providing in specific terms for every exceptional case which may arise is apparent. And yet the inclusion of such cases may well result in great and needless hardship, entirely disproportionate to the good which will result from a literal enforcement of the general rule. Hence the wisdom and necessity here of reserving the authority to determine whether, in specific cases of need, exceptions may be made without subverting the general purposes of the ordinance. We think it entirely plain that the reservation of authority in the present ordinance to deal in a special manner with such exceptional cases is unassailable upon constitutional grounds.

The final objection to the ordinance was rejected on the ground that it was foreclosed by the reasoning in *Euclid v. Ambler*. The application to this case of the principles there laid down was demonstrated by the learned Justice as follows:

After full consideration of the conflicting decisions, we recently have held, that comprehensive zoning laws and ordinances, prescribing, among other things, the height of buildings to be erected and the extent of the area to be left open for light and air and in aid of fire protection, etc., are, in their general scope, valid under the federal Constitution. It is hard to see any controlling difference between regulations which require the lot-owner to leave open areas at the sides and rear of his house and limit the extent of his use of the space above his lot and a regulation which requires him to set his building a reasonable distance back from the street. Each interferes in the same way, if not to the same extent, with the owner's general right of dominion over his property. All rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life. State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable.

The property here involved forms part of a residential district within which, it is fair to assume, permission to erect business buildings is the exception and not the rule. The members of the city council, as a basis for the ordinance, set forth in their answer that front-yards afford room for lawns and trees, keep the dwellings farther from the dust, noise and fumes of the street, add to the attractiveness and comfort of a residential district, create a better home environment, and, by securing a greater dis-

tance between houses on opposite sides of the street, reduce the fire hazard; that the projection of a building beyond the front line of the adjacent dwellings cuts off light and air from them, and, by interfering with the view of street corners, constitutes a danger in the operation of automobiles. We cannot deny the existence of these grounds—indeed, they seem obvious. Other grounds, of like tendency, have been suggested. The highest court of the state, with greater familiarity with the local conditions and facts upon which the ordinance was based than we possess, has sustained its constitutionality; and that decision is entitled to the greatest respect and, in a case of this kind, should be interfered with only if in our judgment it is plainly wrong, a conclusion which, upon the record before us, it is impossible for us to reach.

The courts, it is true as already suggested, are in disagreement as to the validity of set-back requirements. An examination discloses that one group of decisions holds that such requirements have no rational relation to the public safety, health, morals, or general welfare, and cannot be sustained as a legitimate exercise of the police power. The view of the other group is exactly to the contrary. In the *Euclid* case, upon a review of the decisions, we rejected the basic reasons upon which the decisions in the first group depend and accepted those upon which rests the opposite view of the other group. Nothing we think is to be gained by a similar review in respect of the specific phase of the general question which is presented here. As to that, it is enough to say that, in consonance with the principles announced in the *Euclid* case, and upon what, in the light of present-day conditions, seems to be the better reason, we sustain the view put forward by the latter group of decisions, of which the following are representative (citing cases).

Finally, after a discussion of the case of *Eubank v. Richmond*, which is distinguishable on the ground that the ordinance there involved required the committee on streets to fix a line upon a request of the owners of two-thirds of the property abutting on any street, the opinion was concluded with the declaration that the ordinance must be sustained:

Since upon consideration we are unable to say that the ordinance under review is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare," we are bound to sustain it as constitutional.

The case was argued by Mr. G. A. Wingfield for the petitioner and by Mr. Charles D. Fox for the respondent.

#### Interstate Commerce Commission Power to Regulate Car Placement

Under provisions of the Transportation Act the Interstate Commerce Commission has power to enter an order against all carriers of coal, subject to its jurisdiction, compelling them in times of car shortage to place at each mine, within a prescribed district, only that number of cars which is proportional to the capacity of each mine as compared with other mines in the district, irrespective of the fact that a number of privately owned cars, greater than the pro rata share, have been assigned to the mine in question.

*The Assigned Car Cases*, Adv. Op. 781; Sup. Ct. Rep. Vol. 47, p. 727.

Five suits were brought in a federal court sitting in Pennsylvania under the Urgent Deficiencies Act to enjoin and annul an order of the Interstate Commerce Commission. The order attacked prescribed for all railroads under the jurisdiction of the Commission the so-called Assigned Car rule, which governs the distribution of cars among bituminous mines in Pennsylvania during periods of car shortage.

Some of the plaintiffs were mine operators; some were distributors of coal; some were large private consumers; and some were railroads. All had been parties to the proceedings before the Commission. The de-

endants were the United States, the Commission and intervening mine owners.

The term "assigned cars" is used in contradistinction to "system cars." Assigned cars are of two classes: first, those privately owned or leased by a shipper who delivers them to a railroad for placement at a designated mine for loading and transporting coal; second, cars owned by railroads, either the line operating them or some foreign line, and assigned to some particular mine for carrying coal to a particular carrier to be used by it. System cars are those kept available on the line for use at any mine and for any shipper.

Four of these suits were brought by private car owners: in one suit by coal merchants operating mines; in another by concerns operating mines to supply their own needs; in another by coke concerns; and in the fourth by a public utility. In all of these cases the cars were acquired by the shipper to assure the transportation of a necessary supply of coal.

The fifth suit was by thirty-five railroads, which, out of 3,073 railroads affected by the order, refused to acquiesce in it.

It appeared that the rule in question had been adopted after many attempts to solve the problem of car distribution in times of shortage. A previous rule had been adopted by the Commission known as the Hocking Valley-Traer rule, which it had recommended but had never made uniform in application.

The order embracing the rule finally adopted and applying uniformly to all railroads subject to the Commission's jurisdiction was the result of an elaborate investigation extending over four years and involving voluminous evidence and reports. This order prescribed a uniform rule prohibiting any carrier from placing for loading at any mine more than that mine's ratable share of all cars, including assigned cars, available in the district, unless the carrier was permitted to place more by an emergency order issued by the Commission under its statutory powers. The rule required that in determining the number available, all cars should be counted, whether assigned or system, or whether owned by a foreign railroad or by private shippers.

The operation of the rule was made clear in the following portion of the opinion of Mr. JUSTICE BRANDEIS:

The operation of the uniform rule may be illustrated by the following example: Assume that there are in the district 10 mines each with a rating, or capacity, of 20 cars a day; that of the 200 cars needed to fill the district's requirement only 100 cars are available on a particular day; and that of the 100, only 85 are owned by the railroad, the remaining 15 being owned by Mine A. Under the rule, the share of each mine would be 10 cars. Mine A would be permitted to have placed its own cars, but only 10 of them. If, on the other hand, 95 of the 100 cars had been owned by the carrier, and only 5 by Mine A, there would be placed at its mine, in addition to its own 5 cars, 5 of the carrier's so-called system cars. The rule does not divert the surplus of cars owned by one shipper to use by another. It merely puts a restriction upon the use of the private car by limiting the number of the so-called assigned cars which may be placed at a particular mine at a particular time. The owner may use the surplus elsewhere. Or he may lease the surplus cars to the carrier or to another shipper. The operation of the rule upon assigned railroad fuel cars is precisely similar. The limitation is imposed in order to improve the service and to prevent any mine (including one operated by a railroad) from securing, at the particular time, more than its ratable share of the aggregate available coal transportation facilities.

This rule differs from the Hocking Valley-Traer rule in two respects. That rule permitted a carrier to

place at a mine all cars, private or railway fuel cars, which had been assigned to it, irrespective of the fact that it exceeded the pro rata share of available cars. The prohibition formerly in force was merely upon placing system cars at mines which had a full quota of assigned cars. But the rule in the present case prohibits placing more than the pro rata share at a mine even though all sought to be placed at such mine are assigned cars. Furthermore, the present rule applies to all carriers, irrespective of special circumstances, whereas, the former rule operated with respect to a carrier only after a showing that the particular carrier had been guilty of undue discrimination. Consequently, the earlier rule was judicial in nature, while the one here considered is legislative.

The question presented by this appeal and the contention of the various plaintiffs was expressed by Mr. JUSTICE BRANDEIS, in his opinion reversing the decree of injunction, as follows:

The sole question requiring consideration is the validity of the requirement that, unless permission is given by the Commission, carriers shall, in placing assigned cars, be limited to the mine's quota, although the number of cars assigned to it exceeds the quota.

The order is challenged on several ground. All of the plaintiffs insist that in prescribing a universal rule the Commission has exceeded the powers conferred by Congress. All of the plaintiffs appear to attack the rule also on the ground that it is inherently unreasonable. Some insist that the order is unsupported by the findings and the evidence. Some that the rule involves a taking of property without due process of law. The private car owners urge specifically that the rule is an arbitrary interference with the use of their own property. The railroads urge especially that the rule is an illegal interference with their right to manage their own affairs.

The remaining parts of the opinion were devoted to a discussion of the plaintiff's contentions which were all rejected.

First it was pointed out that there was clearly no constitutional obstacle to the rule, because it is settled that Congress could exclude privately owned cars altogether from interstate commerce.

And it may prescribe conditions on which alone they may be used. Limiting their use does not involve regulation of the coal mining industry. Likewise, Congress may prescribe how carrier-owned cars shall be used. The regulation prescribed does not invade the private business affairs of the carrier. It merely limits the use of certain interstate transportation facilities.

But more serious was the contention that the order was in excess of the powers conferred on the Commission by Congress. The particular provisions of the Transportation Act regarded as particularly relevant to this point were:

"(12) It shall be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the miners served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of \$100 for each offense, which may be recovered in a civil action brought by the United States.

"(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with

respect to car service by carriers by railroad subject to this Act."

The divergent constructions of this paragraph urged were (1) that it prescribes a rule complete within itself; (2) that it prescribes the Hocking Valley-Traer rule; (3) that the provision neither requires nor permits action by the Commission supplementary thereto; (4) that the statute fixes a rule identical with the order here attacked; and finally (5) that it does not prescribe a complete rule in itself, nor the Hocking Valley-Traer rule; but prescribes that all cars be counted in determining the share to go to each mine, with administrative discretion left to the Commission to determine how cars shall be distributed. This last contention, advanced by the Commission, was the construction adopted by the Court.

The Commission's contention is, in our opinion, the sound one. It gives effect to the command that all cars shall be counted; and it leaves full scope both to the duty imposed upon the carriers in paragraph (11), and to the authority conferred upon the Commission in paragraph (14), to establish reasonable rules with respect to car service. This construction is consistent also with the legislative history of the provision, including the action of the conference committee by which the differences between the Senate and House bills were reconciled.

In support of their contention that the rule prescribed was unreasonable the plaintiff who owned private cars urged that it would produce waste; compel the owners of assigned cars to reduce their loadings to conform to the average of system car mines; cause privately owned cars to stand idle; greatly injure the steel industry; compel coke companies to shut down; hamper public utilities in purchasing coal; curtail the supply of gas and electricity; delay coal burning steamships; and paralyze the coke industry's development and expansion. The railroads urged that the rule would deprive them of a dependable supply of coal; increase the cost of coal; compel non-use of private cars in time of greatest need; and otherwise prevent efficient transportation service. But these predicted results were held to be contrary to the findings of the Commission based on evidence before it.

The fourth contention separately considered in the opinion was that the findings of the Commission were unsupported by the evidence. This objection was especially directed to the finding that the practice existing before the present order gave to mines with assigned cars an undue share of railroad services other than cars. It was asserted that the evidence of this result was not shown to be typical. The learned Justice suggested that this contention was based upon a misconception of the legislative nature of the order here attacked. His answer to this contention was thus expressed:

In the case at bar, the function exercised by the Commission is wholly legislative. Its authority to legislate is limited to establishing a reasonable rule. But in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission like other legislators, may reason from the particular to the general.

The concluding paragraph of the opinion was an answer to the contention that the Commission here sought to equalize industrial fortune and opportunity under the veil of regulating interstate carriers.

The object of the rule was not to equalize fortunes, but to prevent an unjust discrimination in the use of transportation facilities and to improve the service. In essence, the power exerted is the same as that sustained in *Interstate Commerce Commission vs. Illinois Central*

*Railroad Co.* where it was held that the Commission had power to prohibit the use of any system car, if the private cars assigned to the mine equalled its quota. The fact that Congress has permitted the use of private cars, and that the shippers' acquisition of them proceeds from the motive of self interest which is recognized as legitimate, cannot prevent the Commission from prohibiting a use of the equipment in a way which it concludes will probably result in unjust discrimination against others and may prove detrimental otherwise to the transportation service. The contention is admittedly baseless if, as we have concluded, there is evidence to support the finding that the assigned-car practice causes discrimination in the use of other transportation facilities. For the appellees concede that the possession of private cars confers upon them no superior claim to other services.

In a brief dissenting opinion Mr. JUSTICE McREYNOLDS expressed his view that the purpose and effect of the order complained of were not to regulate the distribution of cars during periods of shortage, but rather to force consumers of coal to distribute their orders among numerous producers in order to be sure of obtaining coal to meet their needs. Objecting to this interference the learned Justice said:

The railroads of this country are private property. They must be operated by their owners according to law under supervision of the Interstate Commerce Commission; but that body is not intrusted with their management and ought not to be permitted to assume it under any guise. In practice, carriers must use many cars daily for gathering fuel necessary for their operations, and I know of no authority possessed by the Commission to prevent them from purchasing this where and as their managers think best. To permit such interference under the mere guise of a rule for distribution of cars seems to me altogether wrong.

He thought likewise that the order was not well designed for its purpose, if the purpose were really to effect an equitable distribution of cars in time of shortage.

If the order was intended to enlarge the total supply of cars or bring about more equitable distribution of available cars in times of shortage, it was foolish. Supply cannot be increased, nor equitable distribution enforced, by prohibiting the use of private or fuel cars when most needed—requiring them to stand idle on the sidings. If, on the other hand, as I must think, the real purpose was to force large consumers to scatter their purchases, the order goes beyond any power intrusted to the Commission.

The case was argued by Mr. Blackburn Esterline for the Commission and by Messrs. Walker D. Hines, Frederick H. Wood, John Lord O'Brian, Ralph J. Baker, Frank Bergen, August G. Gutheim, William H. Spear, E. L. Greever, F. M. Rivinus, Francis L. Gowen and R. Granville Curry for various appellees.

#### Interstate Commerce—Highway Taxes On

It is within the power of a State to impose on a company engaged solely in interstate commerce by motor vehicles a tax for the maintenance and repair of its highways and to require such company to procure a certificate of public convenience and necessity from the State Public Utilities Commission.

*Clarke et al vs. Poor et al*, Adv. Op. 776; Sup. Ct. Rep. Vol. 47, p. 702.

A statute of Ohio provided that a motor transportation company desirous of operating in the State should apply to the Public Utilities Commission for a certificate of public convenience and necessity to do so and should not operate until it had been obtained. At the time of issuance of the certificate and annually thereafter the company was required to pay a tax based upon the number and capacity of the vehicles used.

The plaintiffs here operated a motor truck line as common carriers exclusively in interstate commerce

between Aurora, Indiana, and Cincinnati, Ohio. They neglected to comply with the requirements of this statute and neither applied for a certificate nor paid the tax, but sued in a federal court in Ohio to enjoin members of the Commission from enforcing the act against them.

The Commission had recognized that under previous decisions it had no discretion as to the issuance of such a certificate to companies engaged exclusively in interstate commerce and was willing to grant it upon compliance with the other provisions of the act.

After a hearing before three judges the plaintiff's bill was dismissed and a direct appeal taken to the Supreme Court by the plaintiffs. Their contention is that the statute violates the commerce clause of Constitution because they are engaged solely in interstate commerce not subject to regulation by the state; that the State has no power to compel them to obtain a certificate before using its highways; that it cannot impose on them an annual tax for highway maintenance and repairs and for enforcement of the act in addition to the annual license tax imposed on all persons using automobiles on the highway. The plaintiffs attacked the statute on the further ground that it required that no certificate should issue until the applicant had procured liability and cargo insurance.

All of these contentions were rejected by the Supreme Court in an opinion delivered by MR. JUSTICE BRANDEIS. Concerning the objection that the act discriminates against interstate commerce in imposing a tax he said:

The contrary is settled. The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the State to ensure safety and convenience and the conservation of the highways. Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use. There is no suggestion that the tax discriminates against interstate commerce. Nor is it suggested that the tax is so large as to obstruct interstate commerce. It is said that all of the tax is not used for maintenance and repair of the highways; that some of it is used for defraying the expenses of the Commission in the administration or enforcement of the Act; and some for other purposes. This, if true, is immaterial. Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs.

The attack upon the insurance requirements of the statute was thought by the Court to be improper at this time since the refusal to pay the tax had been based solely upon the fact that they were engaged in interstate commerce and since counsel for the Commission stated that the insurance requirement would not be insisted upon. But the way was left open for objecting to the insurance provision later should occasion arise. The learned Justice made this clear in the following portion of his opinion:

It is not clear whether the liability insurance, for which the Act provides, is against loss resulting to third persons from the applicant's negligence in using the highways within the State, or is for loss to passengers resulting from such negligence, or for both purposes. We have no occasion to consider whether under any suggested interpretation, liability insurance, as distinguished from insurance on the interstate cargo, may be required of a carrier engaged wholly in interstate commerce. The decree dismissing the bill is affirmed, but without prejudice to the right of the plaintiffs to seek appropriate relief by another suit if they should hereafter be required by the

commission to comply with conditions or provisions not warranted by law.

The case was argued by Mr. Murray Seasongood for appellants and by Messrs. Albert M. Calland and John W. Bricker for the Ohio Commission.

### Service of Process—On Non-residents

A state statute providing that a non-resident by operating a motor vehicle on the state highways shall be deemed to have appointed the state registrar his attorney upon whom process may be served is not violative of due process of law if it provides further that due notice be sent to the defendant by registered mail proved by attaching to the writ the return receipt and the plaintiff's affidavit of compliance with the statute and provides that ample opportunity to defend the action shall be given to the defendant.

*Hess v. Pawloski*, Adv. Op. 698; Sup. Ct. Rep. Vol. 47, p. 632.

The plaintiff in the trial court sued for damages resulting from personal injuries alleged to have been negligently and wantonly caused by the defendant in driving a motor vehicle on a highway in Massachusetts. The defendant was a resident of Pennsylvania and was never personally served, nor had any of his property been attached. Service was had, however, pursuant to a Massachusetts statute the following parts of which were set forth in the opinion as material:

The acceptance by a non-resident of the rights and privileges conferred by section three or four, as evidenced by his operating a motor vehicle thereunder, or the operation by a non-resident of a motor vehicle on a public way in the commonwealth other than under said sections, shall be deemed equivalent to an appointment by such non-resident of the registrar or his successor in office, to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him, growing out of any accident or collision in which said non-resident may be involved while operating a motor vehicle on such a way, and said acceptance or operation shall be a signification of his agreement that any such process against him which is so served shall be of the same legal force and validity as if served on him personally. Service of such process shall be made by leaving a copy of the process with a fee of two dollars in the hands of the registrar, or in his office, and such service shall be sufficient service upon the said non-resident; provided, that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the writ and entered with the declaration. The court in which the action is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action.

A special appearance was filed by the defendant, together with an answer in abatement, and a motion to dismiss was made on the ground that the service of process, if sustained, would be a deprivation of the defendant's property without due process of law and contrary to the provision of the Fourteenth Amendment. The Massachusetts courts at nisi prius and on appeal rejected the contention of the defendant and held the service valid and binding on him and affirmed judgment on the verdict returned at the trial.

On a writ of error the Supreme Court of United States upheld the view previously taken by the state courts and affirmed the judgment rendered. The opinion of the court, delivered by Mr. Justice Butler, contained first a brief review of the precedents having a bearing on the validity of service of process on non-residents of the state from which the process issued. Turning from these cases which seem to have involved unsuccessful attempts to secure jurisdiction, the learned Jus-

(Continued on page 661)

# LIMITS OF UNIFORMITY IN STATE LAWS

It Is Not the Province or Purpose of Commissioners on Uniform State Laws to Propose New Laws or Reforms But Rather to Promote Uniformity of Laws on Subjects Already Considered by Public and Legislated Upon by States—Matters that Are Proper Subjects for Such Proposals and Others as to Which There Is Grave Question—Conference is Constantly Being Invited to New Fields—A Note of Warning Suggested\*

BY HON. JAMES F. AILSHIE

*Former Chief Justice Idaho Supreme Court; Member Conference of Commissioners on Uniform State Laws*

EVER since the adoption of the Federal Constitution there has been a recurring conflict between two contending principles and theories of government in this country. In the adoption of the Constitution the states delegated to the Federal Government the power to legislate upon a variety of subjects enumerated in Section 8, of Article I of the Constitution. To these specially enumerated powers there must be added, as said by the Supreme Court in the *Legal Tender* cases, "all appropriate means which are conducive or adapted to the end to be accomplished and which, in the judgment of Congress, will most advantageously effect it." This latter doctrine has been greatly extended and expanded during the intervening years.

On the other hand, all other powers not so delegated expressly or impliedly, are reserved to the several states.

Around this grant of power to the general government on the one hand, and this reservation to the states on the other hand, have been continually waged forensic battles of as vital and far-reaching effect as ever confronted any government either in peace or war.

Alexander Hamilton, in addressing the New York Convention in support of the adoption of the Federal Constitution, speaking of this balance of powers between the two governments, said:

"This balance between the National and State governments ought to be dwelt on with peculiar attention, as it is of the utmost importance. It forms a double security to the people. If one encroaches on their rights, they will find a powerful protection in the other. Indeed, they will both be prevented from over-passing their constitutional limits, by a certain rivalry, which will ever subsist between them. I am persuaded, that a firm union is as necessary to perpetuate our liberties, as it is to make us respectable; and experience will probably prove, that the National government will be as natural a guardian of our freedom, as the State legislatures themselves"

In the exercise by Congress of the powers granted it to legislate for the whole country there has been an ever-increasing tendency to extend that power by legislating upon subjects and conduct undreamed of by Hamilton and his compatriots as falling within the power of Congress, but generally believed to have been reserved to the legislatures of the several states. Sometimes the Supreme Court has agreed with the states in this respect and held such legislation void, but all too frequently, as be-

lieved by many, the almost identical legislation has later been cloaked in a different form while the substance remained the same, and re-enacted by Congress and passed the constitutional test in the court of last resort. This apparent straining of the Constitution and enlargement of the powers granted to the Federal Government has had back of it a psychological reason often overlooked and yet of such pervading potency that it has almost amounted to an accepted habit of thought, that notwithstanding the authority of the states, the powers of the government must expand and keep pace with the advance of science and invention which is yearly changing our manner of transacting business and carrying on the commerce of the country. The ever increasing diversity and rapidity of transportation, the facility and ease with which we exchange intelligences, the multiplicity of mechanical inventions through means of which production has been increased and wealth swollen,—have all combined to magnify the demand for legislation on a variety of subjects that may be the same throughout the country without respect to state lines. Large interests, both individual and corporate, have come to doing business in many states at the same time and they are demanding uniformity of the laws governing and regulating their business wherever they may be, and since it is more difficult to deal with a number of state legislatures than with a single body, they have naturally turned to Congress to see if they could not find some way in which national legislation might expand and solve their problems.

Mr. George B. Young, of Vermont, now President of the Conference on Uniform State Laws, has given utterance to this feeling among the business interests (page 183, May, 1922, *Am. Bar Journal*) in this language:

"Many business organizations do business in many states. The perplexity, uncertainty, confusion, and waste resulting from variant laws in these different states hinder freedom of trade and constitute a serious burden on business between the states. Unless the states themselves remedy this defect, the Federal Government will."

As soon as manufacturers and wholesalers found just how far they could reach into another state with their operations, without being subjected to the local laws of such state, they at once fashioned their business and operations to meet the situation and when thought necessary secured some

\*Address delivered at annual meeting of Idaho State Bar, held Boise, August 12 and 13.

act or amendment from Congress extending their protection just a little further. So it has been with transportation, telephone, telegraph,—about everything we do now is done across state lines except to grow farm products and eat and sleep!

Mr. James M. Beck, former Solicitor General of the United States, in his lectures before the English Bar on the Constitution, speaking of this tendency of the Federal Government says:

"... The dual system of government has been profoundly modified by the great elemental forces of our mechanical age, so that the scales, which try to hold in nice equipoise the Federal Government on the one, and the States on the other, have been greatly disturbed. Originally, the States were the powerful political entities, and the central government a mere agent for certain specific purposes; but, in the development of the Constitution, the nation has naturally become of overshadowing importance, while the States have relatively steadily diminished in power and prestige."

While in the language of Mr. Beck "the great elemental forces of our mechanical age" have been creating a demand among the masters of trade, commerce and industry for legislation effective alike all over the country and have tremendously influenced the drift to a strong centralization of government at Washington, nevertheless, the great body of the people back on the farms, in the forests, on the ranges and in the mills, mines and factories want home rule and local self government.

Much has been said on the subject of states rights, but of course the extreme doctrine promulgated by South Carolina to which President Jackson paid his respects, back in 1832, has long since been exploded. Nevertheless, the two contending principles,—the one for a strong, central government assuming and exercising all the powers possible or permissible under the Constitution, and the other insisting that the states ought to be allowed to exercise every power that is not absolutely essential to the Federal Government—have each at all times had their radical and extreme advocates. In the meanwhile, however, the Federal power has been extending in every direction while state authority has been diminishing.

The American Bar Association was the first civic organization, of national influence composed of a considerable body of representative and influential citizens, to propose a kind of equalizing influence looking to a uniformity of laws among the states and at the same time have those laws local and subject to the will and execution of the states rather than of the general government. With this as one of its objects in view, the American Bar Association at the time of its organization in 1878 incorporated a clause in its constitution providing, among other things, that "its object shall be to promote the administration of justice and uniformity of legislation and judicial decision throughout the nation." In 1889, the Association appointed a committee designated "Committee on Uniform State Laws." That Committee made investigations and in 1891 reported to the Association in favor of the creation of a National Commission or Conference on Uniform State Laws. In the meanwhile, and in 1890, the state of New York passed an act authorizing the appointment of Commissioners to investigate the subject of the creation of a National Conference composed of representatives from the several states. The matter was subsequently taken up by the states, and a Conference of Commissioners, representing nine states met at Saratoga, New

York, in 1892. The admission of representatives from the various states increased from year to year until in 1912 the Conference met with Commissioners present from every state in the Union.

Since then the Conference has met annually with a good attendance of Commissioners who, as a rule, have been able representatives of both the bar and bench of the country. During the thirty-five years' existence of this national organization, it has drafted, approved and submitted to the states fifty acts. Some of these have become obsolete and been superseded by other acts so that there are now pending forty-two acts recommended for adoption. Of these the Uniform Negotiable Instruments Acts alone has been adopted by all the states. The states have varied in their acceptance of the acts recommended ranging all the way from South Carolina, which has adopted only one,—the Uniform Negotiable Instruments Act,—to Wisconsin, which has adopted twenty-six acts. In its approval of this work, Idaho stands above the average of the states with a record for adoption of sixteen uniform acts, five of which were adopted by the last legislature.

The purpose of the "National Conference of Commissioners on Uniform State Laws" as set forth in its constitution is "to promote uniformity in state laws on all subjects where uniformity is deemed *desirable and practicable*." This purpose has been often emphasized and dwelt upon by members of the Conference in opposing efforts made by various bodies and interests to induce the Conference to take up subjects of legislation thought by the Commissioners to be outside the scope of work for which the Conference was organized. It has been thought and generally contended, that the Conference should restrict its labors to investigation, discussion and drafting of acts on subjects of commercial and social interest to the country at large wherein the law itself is fairly well settled and in which uniformity is lacking but is desirable and practicable. The President of the Conference joined the Commissioners from his home state last year in a report to the Governor in which they said:

"Briefly put, it has been the main policy of the Conference to consider only such uniform laws as would directly aid the commercial interests of the country. In this sphere of its activities, it has been most successful. This is so, because, in its preparation of Acts, the Conference has dealt with legal matters, as to which the law is pretty well settled, but where uniformity in the law is lacking in the different states. Nevertheless, it has adopted and recommended several important Acts touching the so-called social relations." (1926 Report Commissioners to Governor of Vermont.)

It is the history of all organizations, that as soon as they come to be useful and wield power and influence somebody wants to use them for the advancement of his own personal interests. The Conference on Uniform Laws is not free from such attack, though I do not believe it has thus far been misused or led aside from the main purpose of its work; nevertheless, I have not failed to observe the presence at these Conferences of representatives of the most powerful interests in the country. Having in mind the field of its usefulness and the influence it has acquired, it is well to pause long enough to consider the limitations of its power and the bounds of its usefulness and some of the agencies that court its favorable consideration. It is not infrequent that the representatives of some class of large interests form an association of their own and have their representatives draft and propose acts in their inter-

est, not very well thought out or understood by lawyers who have not specialized in that particular branch of the law, and the Conference is asked to consider such proposed acts and approve them. This alone should not be considered sufficient ground for rejecting a measure or refusing to consider it, but does suggest potent reasons for most carefully scrutinizing such proposed measure and taking time and adopting means for the fullest investigation and mature consideration before giving approval to any such proposals or their adoption by any state legislature.

Some of these organizations have submitted and recommended proposed acts independently of the National Conference and in a few instances such measures have been recommended by chief executives to their respective legislatures. This illustrates how easy it is, sometimes, for organizations to get ill-considered legislation adopted.

This phase of the matter was given editorial consideration in the March, 1927, issue of *Law Notes*, wherein it was said:

"Obviously, no uniformity of legislation will result from the efforts of two organizations each urging a different 'uniform act.' In the Conference of Commissioners we have an organization for uniform legislation which has functioned for over thirty years, and has procured the enactment of much legislation. It leaves no field for an independent organization working to the same end. It should be generally recognized as the established agency through which all projected uniform legislation should pass, and organizations desiring uniform laws should confine their energies to securing their adoption by the Conference and, this adoption being secured, to seconding the efforts of the Commissioners to obtain the adoption by the various state legislatures. Incidentally, the Conference, which represents every state and submits its proposed measures to the American Bar Association for approval before recommending them for enactment, is a well nigh indispensable check on the extremist tendencies of an organization devoting its energies to a single subject. The zeal of such an organization may be of great value in securing the enactment of a law, but a wider viewpoint should govern its formulation."

It is not the purpose or province of the Conference to propose new laws or reforms, but rather to promote uniformity of laws on subjects already considered by the public and legislated upon by the various states. The mere mention of some of the well-settled subjects regulating the commercial transactions and social relations of the people generally, at once suggests the desirability for their uniformity throughout the states, while some other subjects do not immediately suggest such necessity.

It seems reasonable at once to propose a uniformity of laws throughout the country governing the issuance and circulation of negotiable instruments and it appears equally reasonable to suggest a uniformity of motor vehicle traffic and the law of the road. The reasons for such uniformity are at once apparent. On the other hand, it is not so easy to see any urgent reason for uniformity of laws such as the regulation of public utilities operating in the several states or for the foreclosure of mortgages on real property. Nevertheless, both of these latter propositions are being urged with great vehemence before the Conference. The manner of execution and procedure for foreclosure of a real estate mortgage in Maine or California is of no particular concern to the citizens of Idaho or Florida, though we may admit that it might be of some interest to a few law firms who represent loan and investment companies in the large financial centers like New York, Boston, Philadelphia and Chicago. A somewhat similar observation might be made

with reference to a uniform utilities act and the perpetual franchise provision sought to be incorporated therein. It is thought by some that a note of warning to the Conference itself may well be sounded upon the dangers of impairing its usefulness whenever it attempts to enter the field of reform legislation or the domain of public policy which the people of a state fashion for themselves. There are many subjects of legislation that are, to a large extent, local and upon which different states desire different laws. This necessity, or perhaps, to speak more precisely, this demand, is the outgrowth of a variety of causes peculiar to a locality or state such as climate, production and industry, habits and customs of the people, their political affiliations and religious attachments; from all of which has developed a so-called public policy of the state. Good morals and the public welfare are subjects on which there is much contrariety of opinion both among individuals and communities and even among courts and between courts and legislatures. We will do well not to urge upon diverse state sovereignties our proposed uniform laws dealing with these subjects.

I am moved to make these observations on account of the rapidity with which the Conference is recommending acts in recent years (seven in 1926) and the new fields of legislation to which it is being invited. Power and influence carry with them corresponding responsibilities. We must measure up to these responsibilities. We must not lose sight of the fact that under our form of government the enactment of laws cannot safely precede public opinion and the demand of the people for such laws. Discussion and earnest consideration should come first,—legislation will follow. You cannot make uniform that which has not yet been formed. It may be doubted if we make progress where we are merely changing long and well established customs and procedure that accomplish only the same ends already attained.

In our urge to do things, we must not forget the character and temper of our cosmopolitan citizenship. Let us make haste slowly. We have here the mixing of blood and crossing of purposes of every school of thought, every shade of politics and every mooted theory of government yet conceived by the discontented and restless representatives of every branch and cult of the Caucasian race gathered from the four quarters of the earth, all combined in our common American citizenry. We must test and prove these theories in this vast American melting pot. It may well be doubted if a single sovereignty could ever have successfully handled such a heterogeneous population or served as sole lawmaker for such a people. The States, on the other hand, could meet these problems as local issues, they could take the risk and do some experimenting; while one state was testing out one plan, another might be trying out a very different one,—or better still, they might debate them in their campaigns and in their legislative halls and frequently end them there. The passage of the years laden with their history of state and national issues, partisan campaigns, legislation and judicial constructions furnishes conclusive evidence of the wisdom and far-seeing statesmanship of those fathers of the Constitution who stood firm and persistent for reserving to the states their complete sover-

eighty and autonomy as members of the Federal Union. As we now look in retrospect, it seems that it would have been utterly impossible, with this population, for our government to have survived its internal issues and conflicts and successfully met its external perils without these several state gov-

ernments to equalize public opinion and solve their local problems. The demand for uniformity of laws among the states must therefore find its answer and limitations whenever it runs counter to local necessities, state policy or the social and political aspirations of the people of a state.

## CONTEMPT OF FEDERAL COURTS

By ALBERT SMITH FAUGHT

Member of Philadelphia Bar

THE World War seems to have opened Pandora's box and let loose the critical spirit which, in flitting around, has recently rested on the courts of justice in this country. By the judicious use of illustrative cases a dark picture may be painted of the power which our federal courts possess of decreeing punishment for contempt of court.

Members of the legal profession who have had occasion to look into the subject are aware of the unfairness of popular attacks on the power of the courts of the United States in issuing orders in contempt cases especially since the passage of the Act of Congress of October 15th, 1914, known as the Clayton Act<sup>1</sup> which conferred the right of trial by jury in all actions for criminal contempt except those prosecuted in the name or on behalf of the United States itself.<sup>2</sup>

There is ample room for confusion in the lay mind as to the extent and scope of the power of the federal judiciary in the field of contempt proceedings. It has only been through a series of recent decisions of the United States Supreme Court, in each case reversing the court below, that sharp limits have been fixed as to the power of the district courts of the United States to impose punishment for contempt.

### I.

The first step in modernizing the law of contempt in the federal courts was taken in 1903 by Mr. Justice Brewer in answering for the Supreme Court of the United States certain knotty questions propounded by one of the western circuit courts of appeals in what is known as the *Bessette*<sup>3</sup> case. It was then authoritatively announced that a writ of

error lay to the circuit court of appeals in regard to a judgment that a person who had not been a party to a particular suit was guilty of contempt for violating an order of such court entered in such suit.

If a federal judge in excessive zeal dispenses punishment in contempt proceedings where the circumstances do not justify his action a remedy exists in having his judgment reviewed by the appropriate circuit court of appeals.

In announcing this conclusion Mr. Justice Brewer made three interesting statements:

"The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and decrees of the Courts, and consequently to the due administration of justice.

"But the power has been limited and defined by the Act of Congress of March 2nd, 1831, reading as follows:

"That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree or command of the said courts."

"Proceedings for contempts are of two classes,—those prosecuted to preserve the power, and vindicate the dignity, of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce."

We are accordingly assured that the district trial judges are no longer autocrats whose judgments in contempt are final, as was the law of old England. Clear cut distinctions are drawn between criminal contempts and civil contempts, and both are limited and defined by an Act of Congress passed almost a century ago.<sup>4</sup>

### II.

Eight years later in a proceeding known as *Gompers vs. Buck's Stove & Range Co.*<sup>5</sup> Mr. Justice Lamar handed down the important ruling for the

1. In *Michaelson vs. United States*, 266 U. S. 42 at page 60 Mr. Justice Sutherland, delivering the opinion of the United States Supreme Court, in discussing the Clayton Act, said: "Moreover it is to be observed that secs. 21 and 22 which deal with the subject of contempts, do not contain the limitation in respect to employment contained in sec. 20. Section 21 provides 'That any person (italics those of Mr. Justice Sutherland) who shall wilfully disobey any lawful writ, process, order, rule, decree or command of any district court,' etc. shall be proceeded against for his said contempt as hereinafter provided. 'Section 22 provides for a trial by jury upon demand of the accused in all cases within the purview of the act.'"

This decision indicates that the right of trial by jury is not necessarily limited to labor dispute cases as stated by Mr. Flynn. However, the Supreme Court with its usual caution leaves open the door at some future day to limit jury trials to labor cases.

2. The exception, that the right of jury trials does not exist in criminal contempt proceedings in cases where the United States is the complainant is settled by the case of *Forrest vs. United States*, 277 Fed. 873, decided by the U. C. Circuit Court of Appeals, Ninth Circuit—in which a certiorari was denied by the United States Supreme Court in 258 U. S. 622.

3. *Bessette vs. W. B. Conkey Co.*, 194 U. S. 224, 48 L. Ed. 997.

4. So held in *Crosby's case*, 3 Wils. 188 quoted by Justice Brewer in the *Bessette* case as deciding: "The sole adjudication of contempts and the punishment thereof in any manner belongs exclusively and without interference to each respective court."

5. *Gompers vs. Buck's Stove and Range Co.*, 221 U. S. 418, 55 L. Ed. 797.

Supreme Court of the United States that in civil contempt cases as distinguished from cases of criminal contempt, a federal court had no power to impose imprisonment, except as a means of compelling performance of some affirmative act; and that even in such exceptional cases the defendant had the "keys of the jail in his own pocket" for he became entitled to instant release from durance vile upon doing the particular act he had been lawfully ordered to do by the court.

This significant limitation on the authority of district judges in contempt cases means that in a civil case of contempt those who may be adjudged guilty cannot be sent to jail except to compel obedience to an affirmative order.

They may, however, be subject to a fine but only in cases in which other litigants are entitled to such fines as compensation for the violation of their rights by the persons guilty of the contempt. This Mr. Justice Lamar points out:

"If it is for civil contempt the punishment is remedial and for the benefit of the complainant . . . The only possible remedial relief for such disobedience would have been to impose a fine for the use of the complainant measured in some degree by the act of disobedience. . . . Proceedings for civil contempt are between the original parties and are instituted and tried as a part of the main cause."

The fear of the court in all civil cases of contempt is thus removed from the most trembling heart. Imprisonment cannot be inflicted except upon a defendant who can obtain immediate freedom by obedience. A fine cannot be imposed except as part of the main case and as proper remuneration to the complainant who has been injured by the disobedient conduct of the defendant violating a decree duly entered by the court.

On the other hand, proceedings for criminal contempt are between the public and the defendant, and are not part of the original cause.<sup>6</sup> The prosecution must be in conformity with the practice in criminal cases. Upon conviction the accused may be punished by fine or imprisonment or both. The fine may be paid to the United States, or to the complainant or divided among the parties injured by the defendant's act as the district court may direct. The discretion given to the court in this respect is incidental and subordinate to the dominating purpose of the criminal contempt proceeding, which is punishment to vindicate the authority of the court and punish the act of disobedience as a public wrong.

Furthermore, in criminal contempt, as in criminal cases, the presumption of innocence obtains. Proof of guilt must be beyond a reasonable doubt and the defendant may not be compelled to be a witness against himself. Also it should be noted that Congress has extended the right of trial by jury to cases of criminal contempt by sections 21 and 22 of the Clayton Act of October 15th, 1914, except in contempts arising in proceedings brought by the United States or in its behalf.<sup>7</sup>

Finally the United States Supreme Court in *Ex parte Grossman*,<sup>8</sup> decided in 1925 that the pardoning power of the President of the United States extended to persons who had been convicted of

criminal contempts although this right of pardon does not extend to civil contempts.

### III.

The critical spirit from Pandora's box is still flitting around and has settled for a moment on the federal court house. Perhaps tomorrow it may alight on the halls of Congress. May we not anticipate the voice of protest which will arise in the land concerning the autocratic powers of Congress in attaching and imprisoning citizens who decline to answer questions propounded to them by Congressional committees?

We again turn to the opinions of the United States Supreme Court, where we find it asserted in the *Mal Dougherty case*<sup>9</sup> that the House of Representatives has implied power to punish a person not a member of Congress for contempt. The Court goes on to say:

"We are of the opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. . . . We conclude that the investigation was ordered for a legitimate object; that the witness wrongfully refused to appear and testify before the committee and was lawfully attached; . . . and that the district court erred in discharging him from custody under the attachment."

Professional tremblers may soon find adequate stimulants in contemplating Congressional investigating committees.

### IV.

Is free speech really jeopardized by the trend of recent decisions of the world's most august judicial tribunal?

In May 1927, Mr. Justice Brandeis and Mr. Justice Holmes in their concurring opinion when upholding the conviction of a lady for assisting in organizing the Communist Labor Party of California contrary to the provisions of the Syndicalism Act of that state, have assured us all that our constitutional rights as to the freedom of speech still remain unimpaired:<sup>10</sup>

"The right of free speech, the right to teach, and the right of assembly are, of course fundamental rights. . . .

"Those who won our independence believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; . . .

"Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. . . . The fact that speech is likely to result in some violence on the destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the state."

Upon reading this opinion conservative members of the legal profession are satisfied that there is little real danger that the federal courts will ever make an honest man tremble or give him substantial ground of trepidation lest his liberty of speech and right of assembly be taken from him by the judicial or legislative branches of our United States Government.

6. Follows language of U. S. Supreme Court in the Gompers case, 221 U. S. at page 445.

7. From opinion of Supreme Court in *Michelson vs. U. S.*, 260 U. S. 42, at pages 65 and 66.

8. *Ex parte Grossman*, 267 U. S. 87.

9. *McGrain vs. Dougherty*, 71 L. Ed. 370 at page 381 decided January 17th, 1927.

10. *Whitney vs. California*, 71 L. Ed. 675 decided May 10th, 1927.

## AMERICAN BAR ASSOCIATION JOURNAL

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### JOSEPH R. TAYLOR, MANAGER

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### ECHOES OF FIFTY YEARS

We print in another part of this issue extracts from a number of addresses delivered during the first ten years of the Association's life. They show something of the spirit of the men who helped to start it on a career which will measure fifty years at the coming Semi-Centennial Celebration. They also suggest some of the ideas which the Bar had of its responsibilities at the time, and it is worth noting that these ideas are as valid today as they were then.

Unfortunately during the earlier years of the Association's life a provision in the Constitution imposed upon the President the duty of making an address in which "he shall communicate the most noteworthy changes in statute law on points of general interest made in the several states and by Congress during the preceding year." That this duty of acting as an official compiler was rather irksome is sufficiently indicated in observations made by some of the Presidents. The provision was later repealed, with the result that the presidential addresses on some occasions have become pronouncements of the first importance. But the effect of it during the earlier years was to diminish their historical interest and significance. It is in the annual and other addresses delivered during this period, as well as the discussions on the floor, that we find the most worth-while utterances.

Certainly few things more appealing are to be found in the records than the extract from the annual address of Edward J. Phelps of Vermont delivered soon after the

organization was founded. It was a day when sectional feeling was far from abated—when a great conflict involving constitutional questions of the first magnitude was still within the recent memory of all. It is to the lasting glory of the Bar that its members formed perhaps the first great organization after the conflict to stretch reconciling hands across the dividing line of sections and to dedicate itself anew to the service of a common country. And the spirit in which it did this is no doubt excellently set forth in Mr. Phelps' memorable words:

"We come together from all parts of the country—our common country—from the scenes of a desolation and sorrow on all hands that God alone can estimate—over graves numberless to our arithmetic—the harvest of the efforts to settle constitutional questions by force of arms. Let it all pass. We come to bury the armed Caesar, not to praise him; to renew again, in faith and hope, the work which Marshall and his associates began, of cementing and building up on lasting foundations the American Constitution. . . .

"It is idle to say that our sky is free from clouds. It is useless to deny that wise and thoughtful men entertain grave doubts as to the future. The period of experiment has not yet passed, or rather has been again renewed. The stability of our system of government is not yet assured. The demagogue and the caucus still threaten the nation's life. But we shall not despair. Still remains to us 'our faith, triumphant o'er our fears.' Let us only for our part see to it that we discharge the duty that every man owes to his profession. . . . Let us join hands in a fraternal and unbroken clasp to maintain the great and noble traditions of our inheritance and to stand fast by the ark of our covenant."

Those words are the key to one branch of the Association's principal activities during the last fifty years—support of sound constitutional principles against all manner of attacks, whether in the form of movements for the recall of judicial decisions, efforts to cripple the power of the Supreme Court to declare legislation unconstitutional and to make Congress supreme, attempts to impair the efficiency of the federal judiciary in the conduct of business, or the varied agitations which tend to undermine the entire fabric of constitutional and democratic-representative government as we have it. Its campaign during the last few years to bring the Constitution back to the minds and hearts of the people, is but the latest of a

long series which stretches back to the very beginning of the Association.

Another extract—that from a paper read by the late Judge Simeon E. Baldwin in 1883—strikes a less lofty note but one that sounds curiously familiar just at this time. It shows that the problem of effective prosecution of crime, though doubtless more acute at present, was still a very serious one over four decades ago, and that the view that the pendulum had swung too far in favor of the criminal and against the public was entertained by men who had given the subject study. “Much is said with us as to the rights of criminals,” said Judge Baldwin; “so much that we almost forget that the state has rights against criminals and against those charged with crime, on the maintenance of which the public life depends, and that it is mainly for their maintenance that the state exists.” Compare this with the following extract from the recent report of the California Commission for the Reform of Criminal Procedure: “The old system was designed primarily for the protection of the defendant. It ignored almost entirely the rights of the public. The new system must protect all legitimate rights of a defendant, but at the same time must insure and protect, so far as possible, the great body of law-abiding citizens, the public.”

But similar as these criticisms are there is an immense difference between the circumstances under which they were made. The former was made in a period of criticism only and the latter in a period of action—when intelligent criticism combined with sad experience had paved the way for at least some improvements in the administration of criminal justice. In the development of this spirit of action the American Bar Association, in keeping with its traditions and its commitments from the beginning, has played no unimportant part. The reports of its special committee on law enforcement, following an investigation of the subject here and abroad, were important documents furnishing material and impulse to the national campaign.

In the addresses and discussions during the fifty years of the Association's life there is an abundance of information and inspiration, which our few brief extracts from the records of these earlier times will only inadequately suggest.

#### ANOTHER DREAM DISSOLVED

Those who feel aggrieved at the multiplicity of legislative regulations today and sigh for the simpler manners of an earlier

time, when they imagine life was much less hampered, will find their dreams of a golden age for one period, at least, rudely dissipated by Judge Riddell's article in this issue. We refer to “Some Crimes of the Olden Times.”

Fleeing, if that were possible, for relief from the legislative attentions of today to the England of the sixteenth century, the seeker after the freer life would find himself confronted with a whole category of crimes unlike anything known at present. If, yielding to a pardonable impulse of self-adornment, he chose to wear silk on his hat or a bonnet, girdle or scabbard, not being a mayor or principal officer in some city, he would incur the penalty of a fine and imprisonment for three months. If he carelessly kept hunting and rabbit dogs, not having lands of the value of forty shillings, failed to attend church, sold horses to Scotland, or did any number of apparently innocent things, he would find himself in the hands of the law. He might in point of fact find the situation worse than he imagines it is today.

It is true that the list of regulations which he has to consider at the present time extends somewhat beyond that recognized by the common law or created by statute. For instance, doing or being suspected of doing any one of a number of things disapproved of by the Ku Klux Klan in certain regions may entail penalties even severer than those meted out by the law itself. In brief, there is an attempt to add a sort of unofficial regulation of conduct to the official kind. But even with this addition to the control to which he may be subjected, things are probably not so bad as they once were.

#### CLEVELAND BAR ESTABLISHES MONTHLY JOURNAL

The Cleveland Bar Association has established a monthly Journal, and the first issue appeared in September. The new publication, we are told in an editorial in this issue, “makes its appearance to serve those who have asked for a medium to preserve in a permanent form the excellent committee reports that are prepared during the year, the splendid addresses delivered at various meetings of the Association, and to give to members of the Bar reports of all other activities of the Association. The magazine is intended to bring members of the Bar into closer contact; to stimulate interest in the organization which represents the legal profession in Cuyahoga county; to maintain the honor and dignity of the profession of the law; to cultivate social intercourse and acquaintance among members of the Bar, and to increase the usefulness of the members by aiding the administration of justice and promoting legal and judicial reform.” In view of the many activities of this very much alive organization, the new publication should certainly have no difficulty in securing all the good material it desires.

## CURRENT LEGAL LITERATURE

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### Among Recent Books

**P**PRIVATE *Law Sources and Analogies of International Law* (with Special Reference to International Arbitration). By H. Lauterpacht. 1927. London and New York: Longmans, Green & Co. Pp. xxiv, 326. \$8.50.

In International Law, as in every science, there are contradictory schools and doctrines which study and settle in a different manner its essential problems, and one of those which affects most the conception of its rules and the practical application of its principles is the one which pretends to separate it from the other branches of the Law and to convert it into something special, with its own independent life, taking as a basis the sovereign character of the nations to whose relations it is applied.

Isolating the States from their reason for existence and from their constituent elements, we are asked to derive from the simple will of States, expressed in treaties or in customs, all the law governing them. In this way two important factors are left out. One involves forgetting that the State is first and foremost an association of individuals who, unable to realize separately all their purposes (including human happiness), create juridical organizations arranged for those purposes, beginning with the family up to the association and corporation, and proceeding from the municipality and the county up to the independent State. And the conduct of each of these organizations, created by individuals to satisfy their requirements, must be determined in great measure by the object to which they most vitally correspond. So the rights of the individual are united to the institutions he has created, and determine also in no small part the legal life of these creations.

The second forgotten factor is that the external action of nations, indispensable to human cosmopolitanism, assumes of necessity the existence of a natural society among them, where the same situations exist as those originated by the society of individuals in the nation, and by the association of political subdivisions within the State. There is no ground for denying to such a society, which is that of the independent States, the help and protection of the laws which experience has sealed with its approval as the best in relation to other human societies.

The volume which Mr. Lauterpacht has just published is dedicated to the demonstration of this fact, and it is a very important contribution to the study of Public International Law from the standpoint of one of its most valuable sources: namely, analogy with private law.

The author knows the bibliography of this science and he employs it with indisputable and clear knowledge. Besides, he knows well practical life, and he makes a very complete use of the decisions of arbitrators and of international courts as a help to his thesis.

In addition he reviews all situations which (in the field of the second part of Grotius' famous title, *De Jure Belli ac Pacis*,—the law of peace) have compelled the application to public life of the rules of ordinary private law, and he demonstrates with incontrovertible facts the extraordinary help which these internal rules have lent until today to the doctrine, to the practice, and to the jurisprudence of Public International Law.

After putting before the reader the considerations which present the science of International Law from that point of view, he discusses, in connection therewith, the doctrine of sovereignty, and he goes on with the applications of private law to the acquisition and loss of territory, to sovereignty over sea, territorial waters, and air, to limitations and prescription, to international "servitudes," to State succession (upon a change of sovereignty), to State responsibility for international delinquencies by officials or private persons, to the payment of interest and the measure of damages, in indemnities, and to various other problems of the same kind.

As regards treaties, he studies carefully their analogies with and differences from contracts, and especially (in a separate section) the application of the principles of private leasehold rights to international leases, and of the law of principal and agent to international mandates. Another chapter applies similarly the analogies of the rules of evidence and procedure.

To prove that practice is not out of accord with his statements, the author makes great use of international decisions and the resolutions of the Permanent Court. As regards the first, he gives the chief place to an analysis of the five famous Anglo-American cases of the *Alabama*, the Bering Sea, the Venezuelan boundary, the Alaskan boundary, and the North Atlantic coast fisheries, finding in all of them—not only in the settlement but in the arguments of the different parties—frequent applications of the rules of private law. The same thing may be said of the decisions of the Permanent Court of Arbitration of The Hague, beginning with that between the United States and Mexico, on the Pious Fund of California; of many other decisions of in-

ternational arbitrators, and of the sentences of the Permanent Court of International Justice.

Although the author modestly says in his preface that the work is in a certain sense a comment on article 38 of the Statute of the Permanent Court, which directs the application of those general principles of law that are recognized by civilized nations, a reading of the book convinces one that it is a fundamental work concerning the basis of Public International Law, with which necessarily are bound up the actual position and the future success of the Court. And it is only right to state that the book is written with method and remarkable clearness, and also with admirable conciseness, without wandering or devoting space to long essays on matters which are secondary, or outside its principal subject.

There is a Latin maxim which, by reason of its universal character and validity, can be applied alike to private and to public law; it may be used concerning this important work of Mr. Lauterpacht's and, at the same time, as a comment and recapitulation: "*Ubi est eadem ratio, ibi eadem dispositio juris esse debet.*"

Havana, Cuba.

ANTONIO S. DE BUSTAMANTE.

[Readers of the JOURNAL will recognize Judge de Bustamante as an eminent Spanish-American jurist, a member of the World Court, and the author of several books on international law.]

*The Legal Status and Functions of the General Accounting Office of the National Government.* By W. F. Willoughby, Director Institute for Government Research. 1927. Baltimore: The Johns Hopkins Press. Pp. xi, 193. \$3.00.

Truly the bureaucrats as well as the professions do constantly tend to enlarge their own jurisdictions. The author of this book devotes two-thirds of it to a review of differences of opinion which have arisen between the Comptroller General and the heads of various other governmental departments regarding the nature and extent of the former's powers and duties. A good case is made out for the General Accounting Office, but admittedly not so much from the standpoint of existing law as from that of efficient and economical administration.

The book represents the General Accounting Office as intended to be, not a unit of the executive branch of the Government, but rather an inquisitorial agent of Congress charged with the duty of seeing that revenues provided and expenditures authorized by it are collected and paid out in strict conformity with the law. The author therefore holds that instead of an appeal to the courts to decide how far its jurisdiction extends under existing statutes, action should be sought from Congress to fix this jurisdiction unmistakably—and, incidentally, to enlarge it considerably.

The proper position of the General Accounting Office as he describes it would seem very much the same as that of a public accounting office employed by and responsible solely to a corporate board of directors (Congress) for the purpose of scrutinizing all the acts of the corporate officers and giving or withholding approval without which those acts will be held to be *ultra vires*. Whether this view is entirely novel we cannot say, but it has much to commend it. The author argues for it convincingly,

and submits suggestions for new legislation which will show it clearly intended, and for changes in procedure which will make it properly effective.

Principal among the legislative suggestions is one for the formation of a House (or a Joint Congressional) Committee on Public Accounts, to replace the present eleven House committees on public expenditures, and to exercise, in conjunction with the House and Senate committees on appropriations, a general supervision over the finances of the Government. Such an arrangement, involving as it must the close co-operation of the Secretary of the Treasury, the Director of the Budget, the Comptroller General, and the Congressional committees on appropriations and on public accounts, would seem to promise much in the direction of adequate control of the country's fiscal affairs.

This discussion of jurisdictional limitations and how to cure them is interesting, but not absorbingly so to the reader whose chief concern is for what may be accomplished by the application to Government finances of the measurements and controls which accounting principles and practices supply for private business. Abundant food for this sort of appetite is supplied, however, in the long chapter (about one-fourth of the book) which outlines a system of accounting and reporting to be made possible by the proposed jurisdictional rearrangement.

The system calls for placing the accounts of the Government on an accrual basis, uniform so far as may be throughout the departments and centralized in the General Accounting Office. It contemplates periodical published reports of assets and liabilities and of revenues and expenses, in summary form, but in a manner closely resembling the balance-sheet and income-account reports which are commonly used in private businesses both small and great. By this means it is proposed to put in the hands of Government officials instruments for gauging and controlling its finances which are comparable with those used by them for the same purpose in their private businesses; the advisability of doing so argues its own case. It may be true with a small municipality as with a small business that the management can construct a mental picture of its affairs without the aid of a proper set of accounts, but it is doubtful whether the most competent and best informed officials of the United States Government can possibly have a comprehensive understanding of its financial position without such aid.

Such practices as reporting collections on loans to foreign governments, sales of surplus materials, or receipts of trust funds, as revenues, and retirements of public debt, construction of public buildings, or repayments of trust funds, as expenses, will be recognized as erroneous by anyone with the slightest knowledge of accounting principles. The author says these are actual Government practices, and persons acquainted with the accounts of lesser municipalities will find it no effort to believe him; certainly, however, no private enterprise would set up its accounts in such fashion, and information that the Federal Government does so will astonish many whose acquaintance with accounting procedure is limited to commercial accounts.

With a view to securing for the Government the same centralization of control over its finances

which is insisted on in private business, the author recommends a number of changes in procedure. Among these are the standardization of the accounts and the accounting forms and procedure of the various departments, with departmental reports submitted to and consolidated by the General Accounting Office; the establishment of a central organization for purchasing supplies, maintaining a stores control, and issuing supplies therefrom on departmental requisition, to supersede the present practice of permitting supplies to be purchased separately by the various departments, bureaus, and boards; the organization of a comparatively small corps of field deputies under the Treasurer of the United States to perform the work now done by three thousand or more departmental disbursing clerks; the classification of the controllers of customs, whose duty it is to pass on the adequacy of the work of the various collectors of customs, as representing and responsible to the Comptroller General rather than the Secretary of the Treasury who is accountable for the collectors' performance of their duties; and the segregation of the financial operations of all the revenue-producing enterprises of the Government and the financing of such enterprises through revolving funds.

Some of these changes the Comptroller General contends are called for by the statutes as they now exist; but since this view is disputed, and since admittedly legislation is necessary to effect others, the author of this book feels that the whole situation should receive the attention of Congress and that there should be a comprehensive codification of all the present laws bearing on such subjects, with the addition of such further provisions as will make the General Accounting Office in fact as well as in name the central office of the Government for the collecting and presenting to Congress and to the public of data showing the status of public finances and the manner in which the various departments are carrying out the plans of Congress for the collection and expenditure of public funds.

The book is an expression of the type of thought which feels that the interests of the whole surpass those of any part—that considers it more important that the team should win than that any player should establish a stellar record. Much was accomplished in this direction when the General Accounting Office and the Bureau of the Budget were established by the Budget and Accounting Act of 1921. That six years' operation under the new law should discover possibilities not definitely in the minds of the framers of that law is but natural; and it appears to be the purpose of this book to point them out and discuss measures for realizing them. Everyone who comes into direct contact with the administration of public affairs will recognize some of the facts on which the author bases his conclusions, and will find himself in agreement with many of his recommendations. The book is well worth the study of all persons so situated.

Chicago.

F. B. ANDREWS.

*The Social Structure of Medieval East Anglia.* By David C. Douglas, Lecturer in Legal History to the University of Glasgow (Oxford Studies in Social and Legal History, edited by the late Sir Paul Vinogradoff; Vol. IX). 1927. Pp. xii, 288. \$6.00.

This work is published by the Oxford University Press, American Branch, New York, and is in

all respects an admirable production. It must not be taken as a description or discussion of medieval England generally, or even of its social structure—it lives up to its title, and fully, accurately and interestingly describes the social structure of medieval East Anglia, almost wholly rural as it was.

East Anglia, largely Scandinavian, differed much and in many respects from other parts of England; and not much assistance can be had from the customs of Yorkshire or Kent; but Domesday Book is as useful in East Anglia as elsewhere. The author has diligently compared the evidence of Domesday with the 13th century Extents; and has utilized the extensive Charter materials of the 12th century in tracing the evolution and development of custom, tenure and social structure generally from the time of Domesday to that of the Extents.

Of course, he is not a pioneer even in this limited field; but he has pursued his investigations independently, as well as with great skill and learning. Where he differs from others, his reasons are given clearly and fully; and, while everyone will not agree in his conclusions, all must credit him with historical acumen and intellectual honesty: all will not agree that he has proved that the normal *tenementum* in the East Anglian village was the *manloth* or *bovate* of 12½ acres of arable land with a toftland and a share in the common meadow as appurtenances; but all must admire the industry, candor and learning displayed in the discussion.

The most original part of the work is the chapter on Tenemental Organization. Many curious and anomalous—apparently unexplainable and, certainly, so far unexplained—facts are brought to light; they are nonetheless woven into a reasonably harmonious whole. What with the hide, the virgate, the carucate, the "landsettagium," the "primitive holding of 8 acres," "deleland," "tenmanloths," etc., medieval landholding in East Anglia is sufficiently puzzling to the modern lawyer;—and the authorities are hopelessly conflicting. This is the most satisfactory account so far given to the learned world.

Necessarily follows a description of Rents and Services, as complicated as the Tenures.

To the modern lawyer, the chapter on Judicial Organization will prove of greater interest—the reader might do well to compare in this regard the proceedings in medieval Courts published by the Selden Society. That a predominant part was played by judicial considerations in the formation of the social and political structure of the Middle Ages, is undoubtedly true; and it is equally true that, so far, insufficient attention has been paid to the procedure adopted by the men of these ages in the imposition of jurisdictional obligations on their fellows. What was "soke?" What was the connotation of liability to "soke?" What was the relation of "soke" to hundred? to manor and vill? to hallemot? to dominium? What relation did soke rights bear to social status, to the rights of the lord, his franchises and their origin, the conflict of royal and baronial claims? How far was the freeholder distinguished from others by the protection given him by the King's Courts? To what extent was Maitland right—for *aliquando bonus dormitat Homerus*—in considering that in early days, the Court of the Manor was simply the Moot of the Hall, that

as yet there was no distinction between Court Baron, Court Leet and Court Customary, no separation between Villein and Free Courts? How could the Bishop of Norwich in the 12th century transform the Domesday colony of "liberi homines" into manorial villeins? What was implied in certain of the larger franchises, e.g., that of sending thieves to the gallows? How far was it necessary to have a royal precept to secure a competent jury of trial? Were the peculiar East Anglian institutions all pre-Conquestual? And if not, what were such and what formed part of the Norman machinery of consolidation?

All these and many other problems are elucidated if not fully solved in this excellent work. To me, as I presume to many other readers, the most interesting part of this valuable book is to be found in the Charters and Extents copied in the Appendices. We find a late 12th century Charter whereby Peter, son of William of Edesfeld, is to hold certain land "libere et quiete et honorifice pro una libra piperis annuatim reddendo . . . ad festum Sancti Michaelis," "freely and quietly and honorably for one pound of pepper payable at Michaelmas," he having already paid "unum talentum gersumie," "one talent of bonus." (In some instances in addition to rent the tenant was bound to pay so much "ad scutagium regis," "toward the King's scutage.")

Then by another charter of like date, Ralph, son of Goca, pays "annuatim unam libram piperi et alteram cimini," "one pound of pepper and another of cinnamon, yearly."

The much misunderstood and much maligned "merchet" appears from time to time, e.g., in an Extent of Wigenhall, Norfolkshire, of date 1222, we read that a tenant holds 18 acres for 7s. 4d. rent, "et non potest maritare filiam sine licentia domini sed dabit gersomam et tallagium," "and cannot give his daughter in marriage without the license of the lord, but will give a bonus and tallage." ("Gersoma" or "gersuma" is Blackstone's "Fine"—e.g., *Commentaries*, Bk. ii, p. 98; but its connotation to a modern, at least on this continent, is rather bonus or premium). Sometimes the right of merchet was violated, but always at the risk of the wrongdoer; in the same Extent, we read:

"Willelmus Dix tenet sexdecim acras de terra que fuit Widonis pro quinque solidis et quattuor denariis et debet sectam et gersomam et Thomas Dix abstulit Ingelieth filiam predicti Widonis et ita sine waranto tenet terram illam"—"William Dix holds 16 acres of the land which was Guy's for 5s 4d and owes suit and bonus; and Thomas Dix abducted Ingelieth, daughter of the lord Guy, and so holds this land without warrant."

In an Extent of Binham about 1100, we find one tenant paying 15½d. per quarter, "et unam gallinam," "and one hen"; and another supplementing his quarterly rent by giving "ad Natale, unam gallinam," "one hen at Christmas"; William Escofle had to pay rent quarterly and "crassam gallinam in Natale," "a fat hen at Christmas"; a fourth supplies "ii cariatas ligni," "two cartloads of firewood"; and a fifth, "in prima hebdomada post festum Sancti Michaelis ducet fimum," "in the first week after Michaelmas will draw out manure"; while Roger Verer in addition to quarterly rent and wood,

"nec uxorem ducere potest nec filiam alicui dare sine licentia prioris," "can neither marry a wife nor give his daughter to any one else without the license of the Prior."

While every student of law and custom in medieval England must join the author in his sorrow for the death of Sir Paul Vinogradoff, (*valde dilectus deflendusque*), and the resulting loss of his sympathetic supervision, this book as it stands is a notable production and highly creditable to the industry, learning and candor of its author.

Too much cannot be said in praise of the typography, proof-reading, indexing and binding which are wholly worthy even of the high reputation of the notable publishers.

Osgoode Hall, Toronto.

WILLIAM RENWICK RIDDELL,

*Making America Safe for Democracy.* By B. V. Hubbard. Chicago: B. V. Hubbard. 1927. Pp. 204. \$1.75.

"Making America Safe for Democracy" is a little book of some 200 pages, quite attractive from the standpoint of the printer's and bookbinder's art. The secondary title is "The Referendum, an Instrument of Government."

The book is primarily written not to advocate the referendum as such, but to apply the principle as a method of amending the United States constitution; and the specific proposition is to amend Article V, relating to amendments, accordingly. The real aim appears to be to agitate the repeal of the Eighteenth Amendment, which repeal the author seemingly concedes is otherwise impossible. It is not necessary to agree with the writer's motive, to sustain his contention.

Mr. Hubbard makes out a strong case for substituting the popular vote for the existing method of amendment by legislatures of three-fourths of the states; and he would deprive Congress of the power of proposing any alternative. He points out that our national constitution is a compromise between diverse elements, among them those representing monarchical, aristocratic, and pro-slavery sentiments, all then more or less powerful, but now supposedly extinct. There is now no further reason for compromising with those sentiments, yet the result of the compromise remains. Those sentiments all reflected distrust of popular government. People sought extreme methods of protection against what to them was "mob rule." Some went so far as to propose that the constitution should be perpetually unamendable. This tendency the author rightly denounces as a wish to tyrannize over the living by the dead. Among the champions of the democratic or referendum method of constitutional amendment, he cites the formidable names of Washington, John Adams, Jefferson, Madison, Lincoln, Thomas Marshall, Judge Cooley, and Rousseau. President Wilson is also liberally quoted as supporting it in principle.

The author makes what seems an unanswerable point, that Nevada's population of 77,407, under the present method of amendment, wield the same power through their legislature as do the 10,384,144 of New York state. It is, of course, a very great stretch of reasoning or even imagination to call this

democracy. A parallel existed in the old system of rotten boroughs in England, now abolished.

Mr. Hubbard eloquently denounces the methods by which the adoption of the Eighteenth Amendment was brought about. Among them are named the activities of the Klu Klux Klan, the Anti-Saloon League with its mysterious war chest of forty-five millions, and women like Aimee Semple McPherson. Within the range of his denunciation also comes the adoption of the Nineteenth Amendment, which he charges was, in reality, to perpetuate prohibition. The sketching of the history and methods of the Klu Klux Klan and of other "allies" of prohibition makes good reading.

The book is well written, revealing much earnestness and strong feeling, held, however, within bounds of dignity and self-restraint, and it is replete with interesting historical data and illustrations.

I endorse strongly the author's ridicule of the bigot and reactionary, who in his puny efforts to stem all progress wraps himself in the folds of the flag and of the constitution, and denounces as unpatriotic and wicked all who believe that certain parts of the constitution should never have been enacted, or else that they have been outgrown. It

is folly to worship blindly these unsound or outworn parts, because the document as a whole is one of surpassing wisdom and strength. "A grandson," says the author, "must not be accused of sacrilege and a lack of veneration because he offers to remove his grandmother's side-saddle to the garret, and present her with an automobile." Consciously or otherwise, the reactionaries are the aid of dishonest, corrupt, and selfish interests, who desire to use the government for their own evil and narrow ends.

In conclusion, I would say that in my opinion the author not only proves his case, but he also proves (perhaps without so intending) that the principle of the referendum, as a whole, is a proper and highly desirable safeguard against the dominance of those selfish interests, and should be in the hands of the people for use on major questions in which they have a general and vital interest.

Chicago.

JACOB G. GROSSBERG.

A review by Professor W. S. Holdsworth of Dickinson's *Administrative Justice and the Supremacy of the Law in the United States* appears elsewhere in this number, as a separate article.

Chicago.

C. P. M.

## Leading Articles in Current Law Reviews

*Columbia Law Review*, November (New York)—From *Munn v. Illinois* to *Tyson v. Banton*: A Study in the Judicial Process, by Maurice Finkelstein; Measurement of Law School Work: III, by Ben D. Wood; Cooperative Marketing and the Restraint of Trade, by Mathew O. Tobriner.

*University of Pennsylvania Law Review*, November (Philadelphia)—Admissibility of Declarations of Corporate Agents, by Ellahue A. Harper; Constitutionality of Compulsory Statistical Reports to the Federal Trade Commission, by Leighton P. Stradley; Notes Payable to the Maker, by H. W. Arant; Observations Upon the Status of Corporations in Cuba since 1898, by Gordon Ireland.

*Philippine Law Journal*, September (Manila)—Medico-Legal Inferences from a case of Death due to Multiple Physical Injuries, by Dr. Sixto de los Angeles; The Power of Congress to Relinquish Sovereignty over the Philippines, by Vicente G. Sinco; A Critical Study of the Law of Percentage Tax on Merchants' Sales, by Crispin Llamado; Is Congress Empowered to Alienate Sovereignty of the United States? by Judge Daniel R. Williams.

*American Journal of International Law*, October (Washington, D. C.)—Progress of the Work of the League of Nations Codification Committee, by Jesse S. Reeves; National Economic Independence in the Light of the International Economic Conference, by Wallace McClure; Problems of International Law, in the Mexican Constitution of 1917, by John P. Bullington; The Personal Diplomacy of Colonel House, by Lester H. Woolsey; The Institute of International Law, by James Brown Scott.

*Illinois Law Review*, November (Chicago)—Tax Liability of Transferees, by Dana Latham; Forms of Law and Moral Content, by Fowler V. Harper; The Parol Evidence Rule and Third Parties, by Silas H.

Harris; Holders for Value of Negotiable Paper, by Robert M. Hunter.

*American Law Review*, September-October (St. Louis, Mo.)—The Extraterritorial Powers of Cities, by William Anderson; The Grounds of Pardon, by James D. Barnett; The Practical Side of Perpetuities, by McCune Gill.

*The Law Quarterly Review*, October (London)—The American Law Institute and the Projected Restatement of the Common Law in America, by Hon. George W. Wickersham; Private Insurance in Germany, by the Right Hon. Lord Phillimore; What an Old Reporter Told Me.—III, by Prof. Courtney Kenny; Arrestment; A Comparative Sketch, by E. C. Weiss; The Early History of the Fiscus, by J. Walter Jones; The Growth and Scope of Extra-Territoriality in China.—III, by G. W. Keeton.

*Canadian Bar Review*, October (Toronto)—Addresses at Twelfth Annual Meeting of Canadian Bar Association; 1. Sir James Aikins; 2. Right Honourable Baron Hewart of Bury; 3. Right Honourable F. A. Anglin; Desirable Changes in the Common Law, by John D. Falconbridge; The Appeal to the Privy Council, by The Honourable W. E. Raney.

*Wisconsin Law Review*, October (Madison, Wis.)—Judicial Review of the Decisions of the Federal Trade Commission, by A. M. Tollefson.

*Law Notes*, October (Northport, N. Y.)—The Federal Probation Act, by W. A. Shumaker; Reforms in Criminal Procedure, by Vinton A. Holbrook; Payment for repairs out of Capital or Income.

*Virginia Law Register*, October (Charlottesville, Va.)—Proposed Amendments to the Constitution of Virginia, by Hon. C. H. Morrisett; Priority of General Judgment Creditors over Liens on Chattel in Possession of Trader under the Trader's Act, by Harry Wooding, Jr.

# SOME CRIMES OF THE OLDEN TIMES

BY HON. WILLIAM RENWICK RIDDELL  
Justice of the Supreme Court of Ontario

WILLIAM WEST, born at Beeston in Nottinghamshire, about the middle of the 16th century, was admitted as a Student-at-Law in the Inner Temple in 1568: being "Called", he made a considerable fortune by the practice of law, and retired to spend the latter years of his life at Rotherham in Yorkshire: He would be wholly unknown but for his work first published in 1590, an 8vo which he styled *Symbolæographia, which may be termed the Art, Description, or Image of Instruments, Covenants, Contracts, &c., or the Notarie and Scriuener*. It proved an immediate success and he rewrote it, dividing it into two parts and publishing Part I in 1592 and Part II in 1594. There have been many editions issued—both Parts are full of quaint and curious learning, all of which was of practical value in his time but now for the most part of antiquarian interest only.

The Law Society of Upper Canada is the fortunate possessor of two copies of this work: one was presented in 1832 by Dr. William Warren Baldwin who was one of the five "Heaven-born lawyers" who received a Licence to practise Law from the Lieutenant Governor under the Act of 1803, 43 Geo. III, c. 3 (U. C.), and who became a Benchers and Treasurer<sup>1</sup> of the Law Society of Upper Canada. In this volume, the First Part is of the edition of 1622, the Second Part, of the edition of 1627. The other volume was this year, 1927, presented to the Law Society of Upper Canada by The Oxford Law Association—the First Part being of the edition of 1603, the Second of the edition of 1601. Neither Part of this volume seems to be known to the biographers.<sup>2</sup>

The work was printed before Dr. Johnston fastened shackles on English Orthography, and when everyone could spell as he pleased: and we accordingly find "Symboleography", "Simboleography", sometimes the last syllable is spelled with "ie" instead of "y". We have "wills", "wils" and "willes" in the same paragraph and "wylles" not far away; "be" and "bee" in the same sentence; "Presidents" and "precedents"; "Attorney", "Attourney"; "maner"; "manner"; "Baylif", "Bailiffe", etc.; "Millar", "Milner"; "Shieriefe", "Shireff", etc. "Cause" is used for "consideration", adopting the Civil Law "causa" (West generally speaks of "Ciuill Law"). We run across strange words or familiar words with strange meanings: e. g., "badger", not the plantigrade quadruped, *Meles vulgaris*, but a middleman in grain, &c.; the farmer agrees to "inne hay"—sometimes we come across an oddly familiar word, we do not find a "blind pig", indeed, but "I. S. nuper de C. in com. N. Laborer" (J. S. formerly of C. in the County of N., Laborer) is charged that "tenet & occupat quandam domum sive Tabernam no. habent. vsuale signum apte apposit., vulgariter dict' a blind Tauerne" (he holds and occupies a certain house or

Tavern not having the usual sign properly attached, commonly called a blind Tavern.)

But the object of this article is to speak of some old time crimes now happily vanished, and for that purpose I shall make use of the Third Section of the 1601 edition of the Second Part: "Of Offences and Indictments." This contains an enumeration and definition of crimes and forms of indictments: the indictments seem to have been taken from actual prosecutions.

In sec. 72 is an Indictment on the Statute of (1554) 1, 2 Philip and Mary, c. 2, which forbade anyone wearing silk on his hat, bonnet, girdle, scabbard, hose, shoes or spur leathers unless he was a Mayor, Bailiff, Alderman or principal Officer in some city—the penalty was three months imprisonment and ten pounds fine.<sup>3</sup> All Indictments were in those days in Latin although the trial judge generally directed that they should be explained to the accused in English—their intolerable length was already complained of but Crown Counsel were paid by the folio. I leave out much of the Indictment retaining only so much as is needed to show the form:

"Ivratores pro Domina Regina praesentant quod A. B. de C. in dicto Comitatu, Tailor, natus infra hoc regnum Angliae videlicet, apud C. praedictam, sed filius aut haeres apparens alicuius militis, aut hominis altioris gradus non existens nec potens expendere per annum viginti libras . . . nec valens ducentas libras de bonis suis propriis . . . 20 tamen die Octobris, anno regni dicte dominae nostrae Elizabethae . . . Tricesimo, apud C. praedictam . . . per totum dictum 20 diem . . . interiori parte cuiusdam pilei sui (Anglice vocati a CAP) quodam serico (Anglice dicto TAFFATA) ad valorem 2 solidorum illicite palam usus est contra formam cuiusdam STATUTI in parlamento Phillippi & Mariae nuper Regis & Reginae Angliae, tento apud Westm. in com. Midd. Annis regnorum suorum primo & secundo, in huius modi casu prouisi & editi"—"The Jurors for our Lady the Queen present that A. B. of C. in said County, Tailor, born within this Kingdom of England that is to say at C. aforesaid but not being the son or heir apparent of any Knight or of any person of higher degree, nor able to spend £20 a year . . . nor worth £200 of his own proper goods . . . yet on the 20th day of October in the 30th year of our said Lady Elizabeth (i. e., 1588) at C. aforesaid through the whole said 20th day, in the inner part of a certain head covering of his (in English called a CAP) a certain silk fabric (in English called TAFFATA) to the value of 2 shillings unlawfully and openly wore: against the form of a certain Statute in the parliament of Philip and Mary formerly King and Queen of England held at Westminster in

1. See my *The Legal Profession in Upper Canada in its Early Periods*, Toronto, 1916, p. 86—he presented at this time 50 volumes in all to the Library at Osgoode Hall, Hilary Term, 3 Will. IV.

2. In the *Dictionary of National Biography*, vol. 60, p. 346, the following editions are the only ones mentioned:

First Part, 1590, 1592, 1610, 1618, 1622, 1627.

Second Part, 1594, 1611, 1618, 1627.

3. *Statutes at Large*, vol. 2, p. 465. This Statute was repealed by (1604) 1 James I, c. 25. Persons of high degree or able to spend £20 a year were excepted and some others.

4. It will be observed that the Indictment does not state as later it always did that the Jurors "upon their oaths" presented. In some of the Forms, we have "super sacramentum suum." The diphthong "æ" in mediaeval Latin was very often written "e" as here in "dicte."

the first and second years of their reign in such case provided and published."<sup>4</sup>

Wearing a cap at all was dangerous in some places—we are given a form of Licence whereby Queen Elizabeth "forasmuch as we be credibly informed that our welbeloued T. M. for divers infirmities which hee hath in his head, cannot conveniently without his great danger be discouered of the same", lets "all maner of our subjects . . . to wit that in consideration thereof," she has "licenced him to vse & weare a bonet at all times as well in our presence as elsewhere at his libertie."

Nor might one omit attending Church. We have an Indictment against "A. B. nuper de C. in Com. pred' E. Ar.," A. B., formerly of C. in the said County E. Esquire, who on July 10, 1561, was 16 years old et ultra but "non accessit (Anglice *did not repaire*) ad ecclesiam parochial' de D. pred' nec ad aliquam aliam Ecclesiam, capellam aut visuale locum communis pre-cation' . . . sed abstinuit ab eisdem (Anglice, *hath forborne the same*) p. spacium . . . sex mensium"—did not repair to the parish church, chapel or usual place of common prayer . . . but hath forborne the same for the space of six months. This was a violation of two Statutes (1558) 1 Eliz., c. 2 and (1581) 23 Eliz., c. 1.<sup>5</sup>

We have, too, an Indictment against a goldsmith for gilding "auro purissimo ad valentiam quinq' solidorum", with refined gold to the value of five shillings, "quoddam manubrium pugionis ferrei (Anglice *dict' a dagger hilt of yron*) . . . valor' duorum solidorum," a certain iron dagger hilt of the value of two shillings. This was contrary to the Statute (1420), 8 Hen. V. c. 3, which enacted "qe nulle persone exorre en temps avenir ascuns dez gemes appellees shethes ne metaille sinon argent & les ornements de seint esglise"—that none hereafter gild any . . . sheaths or metal except silver and the ornaments of Holy Church. The penalty was a fine of ten times the value of the thing gilded and one year's imprisonment.

A clergyman, I. R., was indicted for celebrating Mass on April 8, 1592, and a widow, Maria B., for hearing it—this was a violation of the Statute (1581) 23 Eliz., c. 1.<sup>6</sup>

This offence was about as bad as that of the laborer over 14 with healthy body who wandered around begging or of the person who knowingly harbored him and "tunc & ibide' panem & potum voluntarie dedit in contemptum dict' dom' reg' ac cont' forma' statutor' pred.," then and there wilfully gave him bread and drink in contempt of our said Lady the Queen and against the form of the statutes aforesaid. This was against several Statutes of Queen Elizabeth, notably (1562) 5 Eliz., c. 4 and (1572) 14 Eliz., c. 5.<sup>7</sup>

A. B. of C. a Baker was indicted for carrying on business as a "Milner" against the Statute of (1329)

3 Edw. III.<sup>8</sup> This was as bad as keeping "canes venaticos & leporarios", hunting and rabbit dogs, not having lands of the value of 40s., or fishing in "uno stagno voc' H. Milne-pool . . . cum hamis & alijs engen' . . . et diuersos pisc' cep'"—a pond called H. Mill-pool with hooks and other engines and taking divers fish.<sup>9</sup>

For "eating Corne with a flocke of sheepe"; for "being a man of euill behaiour"; for "keeping of a blind Taverne without a signe . . . and that his wife is a common scold"; for "selling Ale in . . . Kilderkins"; for that being a priest "quandam A. B., mulierem defamatam et stuprosam, publice et notorie custodiuit et habuit . . . in communi stupro"; for "saying of Masse in the Vestrey of a Church"; for being a "common Barretor, a stirrer vp of strife . . ." for "taking away of a woman seruaut"; for "keeping Grey-hounds, hounds and ferrets", not being able to spend 40s (say \$10, now perhaps \$200) per annum; for "keeping of euill rule"; for saying to and of a Jury "Fie on you, false harlots, pampered knaves and periured knaues"; for saying of the "Images in the Church, 'they be but idols' cum multis alijs verbis scandalosis et hereticalibus"; for selling horses to Scotland—all these and more indictments for such fearful crimes are to be found in this work.

About the worst of all crimes was the impossible crime witchcraft. We have a definition of "Magicke", "Magitians", "South saying Wizzards", "Diuination", "Jugling", "Inchannting and Charming", "Witcherie" along with "Heresie."

There are three forms of Indictment for Witchcraft given. The first two being "for killing a man by witchcraft vpon the Statute of Anno 5 of the Queene" (Elizabeth) and the third "for bewitching a horse, whereby he wasted and became worse."

It will be sufficient to give the last and I accordingly translate it:

"It is to be enquired on behalf of our Lady the Queen if Sara B. of C. in the County of York on the 20th day of August in the 34th year of the reign of our said Lady the Queen (1592) certain most nefarious arts (in English called Inchantments and Charmes) at C. in the said County of York maliciously and diabolically, in upon and against a certain horse of white color and of the value of £4 then being of the goods and chattels of a certain J. S. of C. aforesaid of the said County of York, gentlemen, did exercise and practise—whereby the said horse of the said J. S. on the said 20th day at C. aforesaid was wholly deteriorated and destroyed against the peace of Our said Lady the Queen and against the form of the Statute in such case provided and promulgated."

If we are not better than our fathers, at all events, we are different.

5. By (1558) 1 Eliz., c. 2, s. 14, every one must after St. John's Day (June 24, 1559) attend the Parish Church or Chapel or some place of common prayer under a penalty of 13d for each offense; by (1581) 23 Eliz., c. 1, s. 5, every person over 16 must do so under penalty of £20 per month.

6. This by s. 4 imposed on the hearer a fine of 100 marks, £66 13 4, and imprisonment for a year; on the celebrant a penalty of 200 marks, £133 6 8, and imprisonment for one year and until the fine was paid.

7. By (1588) 5 Eliz., c. 4, s. 18, all laborers and artificers must work from the Midst of March to the Midst of September from 5 a. m. to 7 or 8 p. m. except for "Breakfast, Dinner or Drinking, the which Times at the most shall not exceed two Hours and a Half in a Day that is to say at every Drinking one half-hour, for his Dinner one Hour and for his Sleep when he is allowed to sleep, the which is from

the Midst of May to the Midst of August, Half an Hour at the most and at every breakfast one Half-Hour." From the Midst of September to the Midst of March they worked "from the Spring of the Day in the Morning until the Night of the same Day" with the same intermissions. The penalty for disobedience was a penny for each hour's absence "to be deducted and defaulted out of his Wages."

8. This Statute does not appear in the *Statutes at Large*; but the Presentment gives its tenor: "Quod artificiar' & gentes occupationem habentes & quilibet eorum ad suam artem seu occupationem se teneant & quod nullus exerciat aliam artem seu occupat' nisi tamen ea' q' elegit.—" that artificers and people having an occupation and each and every of them confine themselves to their own art or occupation and that no one exercise any other art or occupation.

9. (1539) 31 Hen. VIII, c. 9, s. 2, punishable with three months' imprisonment.

## ECHOES OF FIFTY YEARS OF THE AMERICAN BAR ASSOCIATION'S LIFE\*

Edward J. Phelps of Vermont Pleads for Maintenance of the Noble Traditions of Our Constitutional Inheritance—John F. Dillon of New York Speaks of the Spirit of Freedom that Pervades the Common Law—Alexander R. Lawton of Georgia Stresses Duty of Profession to Preserve Fame and Memory of Its Great Men—Cortlandt Parker of New York Tells of a Hero of the Bar—Simeon E. Baldwin of Connecticut Criticises Certain Aspects of Criminal Prosecution in America—Other Echoes of Association's Earlier Years

### The Association's Highest Task

(From Annual Address by Edward J. Phelps\*\* of Vermont, in 1879.)

AND, gentlemen, allow me one further suggestion. What good is to come from this Association, we are trying to build up? What is to be its significance, or its ultimate value? What is to repay us, or any of us, for turning aside from the current of our busy lives, to meet together here? Questions of detail in the machinery of the law will be usefully dealt with, no doubt. The pleasure of meeting and forming acquaintances between men of the profession from all the various states will doubtless be great. But what final good, what permanent usefulness is reasonably to be expected from it, unless it be the creation in our profession, by common consent, by mutual intercourse and support, of a broad, national, elevated, independent, fearless spirit of constitutional jurisprudence? The spirit that builds up and perpetuates, rather than that which pulls down and destroys.

We come together from all parts of the country—our common country—from the scenes of a desolation and sorrow on all hands, that God alone can estimate—over graves numberless to our arithmetic—the harvest of the effort to settle constitutional questions by force of arms. Let it all pass. We come to bury the armed Cæsar, not to praise him. To renew again, in faith and hope, the work which Marshall and his associates began, of cementing and building up on firm and lasting foundations the American constitution. Is it the court alone that is charged with that duty? Have we no part or lot in the matter? Lingers among us no memory of those who are gone? Comes down to us no echo from our fathers' time, that shall awake an answering voice?

Fortunately for us all, we have in the successors of the old court, an upright and excellent tribunal. Judges who have addressed themselves, and will continue to address themselves, with great ability, patriotism, and success, to the difficult and

embarrassing questions, born of the troubled time. But no court can stand without the cordial support of the bar. It was the strength of Marshall's court, that those great men who rallied about it in the profession, and aided in its discussion, stood by it and sustained it before the country, when important decisions were made, with a moral force that was adequate to all occasions.

It is idle to say that our sky is free from clouds. It is useless to deny that wise and thoughtful men entertain grave doubts about the future. The period of experiment has not yet passed, or rather has been again renewed. The stability of our system of government is not yet assured. The demagogue and the caucus still threaten the nation's life. But we shall not despair. Still remains to us "our faith, triumphant o'er our fears." Let us only for our part see to it that we discharge the duty that every man owes to his profession. And come what may, "Thro' plots and counter plots—

Thro' gain and loss—thro' glory and disgrace—  
Along the plains where passionate discord rears  
Eternal Babel,"

let us join hands in a fraternal and unbroken clasp, to maintain the great and noble traditions of our inheritance, and to stand fast by the ark of our covenant.

### Spirit of the Common Law

(From Annual Address by John F. Dillon\* of New York in 1884.)

The first observation I submit is that the Common Law, as well as the institutions which it developed or alongside of which it grew up, is pervaded by a spirit of freedom, which distinguishes it from all other systems and peculiarly adapts it to the institutions of a self-governed people. It is clearly established by the laborious and learned researches which have been more recently made that the germs and elements of this law and of English polity are of Germanic origin. The Saxon Conquerors of Great Britain were not mere bodies of armed invaders. They went to England during two or more centuries in families and communities. What manner of men were they? Guizot, certainly no partial witness, dwells upon the fact the distinguishing character of the Germans was "their powerful sentiment of personal liberty, personal independence and individuality." He affirms and repeatedly re-

\*This article is made up of brief extracts from certain addresses made at the Annual Meetings of the Association during its earlier years. It is planned to continue these extracts from time to time during the present "Semi-Centennial Year." The titles given to the extracts are merely informative and are not the titles of the addresses from which they are taken. These addresses will respectively be found in the volume of the Annual Reports of the Association for the year mentioned at the beginning of each extract.

\*\*President American Bar Association 1880-81.

\*President American Bar Association, 1881-2.

iterates, that it was they who "introduced this sentiment of personal independence, this love of individual liberty, into European civilization; that this was unknown among the Romans; unknown in the Christian church, and unknown in nearly all the civilizations of antiquity. The liberty which we meet with in ancient civilizations is political liberty—the liberty of the citizen, not the personal liberty of the man himself."

Thus conquering and colonizing England, they carried with them "from lands where the Roman Eagle had never been seen, or seen only during the momentary incursions of Drusus and Germanicus," their language, their religion, their customs, their laws, and their organizations. These were indigenous, homebred, without trace of tincture of the Roman law and institutions. They borrowed nothing from antiquity or from surrounding peoples. They founded, and in the course of centuries their successors and descendants—the people of England—built up their institutions on their own model. Macaulay speaks of this with his accustomed vividness: "The foundations of our Constitution," he says, "were laid by men who knew nothing of the Greeks, but that they had denied the orthodox procession and cheated the Crusaders; and nothing of Rome but that the Pope lived there. Those who followed contented themselves with improving on the original plan. They found models at home; and therefore they did not look for them abroad." In words, well known, the author of the *Spirit of the Laws*, referring to the checks and balances of the English Constitution, says: "This beautiful system has been found in the forests of Germany." (*Ce beau système a été trouvé dans les bois.*)

This love of personal freedom and independence was impressed upon the institutions they founded or adopted or modified. Learned investigators differ concerning the extent to which Roman law existed and prevailed at the time of the Saxon conquest, and the extent to which it was adopted or incorporated into the English laws, usages and institutions. But there is an universal assent to these propositions, viz: that the Saxon spirit of freedom was embodied in the various local courts; that it was in these popular tribunals that the principles of law and local government were cultivated and disseminated; that the Saxon breathed into the English Government and institutions "a spirit of equity and freedom which has never entirely departed from them," and that in the course of time the Common Law intertwined its roots and fibres inseparably into the Constitution, polity, local and municipal institutions, the civil and criminal jurisprudence, the family relation, and the rights of person and of property. So from an immemorial or early period, the local territorial subdivisions of England, such as towns and parishes, enjoyed a degree of freedom and were permitted to assess upon themselves their local taxes and manage their local affairs. The rate-payers were thus dignified by being an integral part of the communal life; the foundations of municipal liberty were laid; political power was decentralized; knowledge of the laws and reverence for and obedience to them were constantly taught by a participation in their administration and enforcement. This is exactly the opposite of the systems prevailing on the continent, where the central power absorbs, governs, regulates

everything, thereby destroying municipal freedom and the capacity to enjoy and exercise it, as well as the power to defend and preserve it.

## Fame and Service at the Bar

(From Annual Address by Alexander R. Lawton\* of Georgia in 1882.)

It was but natural that my predecessor in this task should have presented for your consideration the names of the men of our profession who had made their lives famous and illustrated their country while occupying and adorning the judgment seat, and dispensing justice under the high sanctions of power and place, or of those whose fortune it had been to assist in giving to the country its fundamental law—the framers of our Constitution. But we meet here as the representatives of the American Bar, and should see to it that oblivion is not injuriously anticipated in the case of those who ministered at the altar of Justice with more than their share of learning, ability, and success, but without the possession of such national office and honors as to give them a place in the public history of the country. Should we not seek out from our own personal observation as well as from tradition, the names and services of those of our profession who have given tone and character to its ministrations, even though their talents were mainly expended upon the controversies of individuals, and seemingly transitory affairs, and were not made conspicuous by the bestowal of national honors and the exercise of functions thus derived? For it is painfully true that after the lapse of a very few years scarcely any trace can be found of the services rendered to the state, to society, and to the cause of truth and justice by the very best of our profession; while history records and the public voice resounds with the services of men greatly their inferiors, whose fortune it has been to "lead battalions to victory," or, the "applause of listening senates to command."

Take one or two examples: How much of the public history of the country is taken up with the life and services of Chief Justice Gibson, of Pennsylvania, and how many of the younger members of the profession today know aught of that great man—except, perhaps, that he delivered many opinions, which appear in many volumes of reports? And yet he presided for twenty-five years over the highest tribunal of that great state, with such transcendent ability and integrity of purpose, that those who were nearest to him almost worshiped him. It was Chancellor Kent who said that he was a "giant intellect as he was in stature"; and his opinions can safely challenge comparison, for the vigor of his judgments and the purity and force of his judicial style, with those of the most eminent judges who ever sat upon King's Bench or Woolsack. His qualities as a man, and his overshadowing reputation as a magistrate were such, that when, late in life, he was superseded as Chief Justice, and a distinguished young member of the bar selected to fill that place, the latter positively declined to claim the central seat, but insisted that his venerable associate should still occupy that place—which he did to the end of his life. Graceful and touching tribute! Honorable alike to Gibson, who received, and to

\*President American Bar Association 1882-83.

Black, who rendered it. Take another example: Theophilus Parsons, of Massachusetts, was Chief Justice of that state for only five years, in the early part of this century, at a most eventful period in the judicial history of that advanced state; yet he made more important changes and far-reaching reforms than were ever accomplished before or since in the same length of time, either in England or America, and gave to the judiciary of Massachusetts a rank and leadership in the discussion and decision of great questions, which it has never lost to this day. He was also a man of letters and of science of the very first order; so rounded and complete in character and attainments, that Judge Story said of him, he would certainly have been Chief Justice of the King's Bench had he lived in England. But Theophilus Parsons lacked the stamp of national office. How many pages in the public history of the country does he fill? But one more example: Jeremiah Mason practiced law first in New Hampshire and then in Boston. He rarely ever encountered his peer, and never his superior. But his brains and energies were exclusively given to the practice of the law. How soon will he be forgotten, I fear, even by the profession! And yet Daniel Webster said of him, and said it after he had held converse with the truly great of all America, and of Europe as well, and had touched the height of his own Olympian fame: "I have yet to encounter a greater intellect than Jere Mason." And at another time he said, referring jocularly to the hard blows he had received at Mason's hands: "In no case in which I have encountered him, was I able to dig so deep that old Jere Mason did not dig under me."

### Heroes of the Bar

(From Annual Address by Cortlandt Parker\* of New Jersey in 1880.)

It is the tendency of the times to degrade the profession into a trade; to make it a means of self-aggrandizement, a ladder to political office; to forget or despise its lofty theory—the theory which in almost every land has regarded the advocate as a minister of justice, and required of him the exhibition at all times of moral courage, of self-forgetfulness; the vindication of truth; a tender and unflinching protection of weakness and distress.

It is our duty to struggle against this demoralizing tendency, to elevate ourselves and elevate each other into the atmosphere, moral and intellectual, of the great exemplars of the profession; and for that purpose to contemplate and remember their virtues, and hold them up for admiration and emulation.

There stands, if indeed the commune has not destroyed it, at the great stairway leading to the court rooms in the halls of justice in Paris, a statue which no lawyer can behold without intense emotion. It is that of Malherbes, the brave defender of Louis XVI on his trial before the crowd of cowards, fanatics and assassins, which doomed him to death. He was a man of three score years and ten. He had been a minister under the king, and distinguished for the boldness with which he then asserted popular rights, and aided in the march of progress. He had retired from office defeated, while other counsels than his ruled the hour. But when

his king was dethroned, accused, and in danger of his life, he came promptly to the rescue, and begged and was accorded the dangerous privilege of joining in his defense. Fearlessly and earnestly he pleaded his foredoomed cause before the eight hundred excited men, who were both the accusers and the judges of the unhappy prince, standing beside him to the last, regardless of the fate for himself, which he knew he invited. That fate he met. Ere long, he and his family followed their master to the guillotine, their only crime that he had defended Louis Capet. Yet, it seems to me, it was reward enough for all, that there, just there, where every advocate in Paris must forever see it, his statue should be placed; its calm duty-loving eyes invoking the veneration of the profession through all the ages, inscribed with the epitaph which chronicles his history—"Strenue semper fidelis regi suo, in solio veritatem, praesidium in carcere, attulit." "Faithful ever to his king, when on the throne he told him the truth; when he was in prison he brought him aid."

Moral courage—bravery for the truth, as one sees the truth—bravery for the helpless, the greater in proportion to their distress—all, not for gain, but because he is a minister of the law, sworn to seek and to do justice and follow right, herein is epitomized the moral duty of the advocate.

Such courage—such appreciation of duty, thank God, is not rare. The opportunity for its exercise seldom comes without finding the man ready. If we would have it always so, let us look back often at the heroes of the bar; let us study and rival their virtues; let us make this association and its meetings a means of perpetuating their fame, and with it their self-devotion and their love of their country and their kind.

### Public Opinion and Law Enforcement

(From paper read by George A. Mercer of Georgia in 1879.)

In all free governments, at least in those which have adopted the common law, the system of trial by jury may be regarded as a fundamental feature. While it is an established principle that the judge responds for the law, and the jury for the facts, the two are frequently so intimately blended as to be incapable of severance. In all such cases the jury practically decide the law as well as the facts. The law is, therefore, enforced by men drawn from the community at large, who participate in its feelings, and are influenced by its spirit. A proper public temper is, therefore, essential to the pure administration of justice. The judges are often elevated above the passions and prejudices which agitate the popular heart, and resist the contagion which has poisoned the mass. But the jury, drawn from the great body of the people, is already steeped in its spirit and tainted by its corruption. The evils that afflict a state arise not only from the defects of its laws, but also from their imperfect execution. Now, where the trial by jury prevails, laws forbidding offences which receive the tacit assent of a depraved public sentiment cannot be rigidly enforced. The laws which prohibit duelling, the carrying of concealed weapons, gaming in its various forms, the illicit intercourse of the sexes, and other offences of a similar character, are often notoriously

\*President American Bar Association 1883-84.

destitute of coercive force; and juries, responsive to the spirit of the community, refuse to lend their necessary aid to their application and enforcement. A very striking illustration of the influence of national opinion upon positive legal enactment is furnished in the life of Lord Erskine, in his defense of Lieutenant Bourne, of the royal navy, brought before the court of King's Bench, for having sent a challenge to Admiral Sir James Wallace, his commanding officer, who was said to have used him very tyrannically. Erskine declared, "I profess to think, with my worthy friend who spoke before me, that the practice of private duelling, and all that behavior which leads to it, is a high offence against the laws of God, and . . . that it is highly destructive of good government among men. . . . But though I feel all this, as I think a Christian and a humane man ought to feel it, yet I am not ashamed to acknowledge that I would rather be pilloried by the court in every square in London than obey the law of England, which I thus profess so highly to respect, in a case where that custom, which I have reprobated, warned me that the public voice was in the other scale."

### Law School vs. Apprentice Training

(From Report of Committee on Legal Education, Carleton Hunt of Louisiana, Chairman, in 1879.)

There is little if any dispute now as to the relative merit of education by means of law schools, and that to be got by mere practical training or apprenticeship as an attorney's clerk. Without disparagement of mere practical advantages, the verdict of the best informed is in favor of the schools.

The benefits which they offer are easily suggested, and are of the most superior kind. They afford the student an acquaintanceship with general principles, difficult, if not impossible to be otherwise obtained; they serve to remove difficulties which are inherent in scientific and technical phraseology, and they as a necessary consequence furnish the student with the means for clear conception and accurate and precise expression. They familiarize him with leading cases, and the application of them to discussion. They give him the valuable habit of attention, teach him familiar maxims, and offer him the priceless opportunities which result from contact and generous emulation. They lead him readily to survey the law as a science, and imbue him with the principles of ethics as its true foundation. "Disputing, reasoning, reading and discoursing" become his constant exercises; he improves remarkably as he becomes acquainted with them, and attains progress otherwise beyond his reach.

### Legislative Competency

(From Presidential Address of Edward J. Phelps of Vermont in 1881.)

This question has been discussed, as if the choice lay between our unwritten law and such a code of statute law as the best available learning and wisdom may laboriously devise. I do not so regard it. The proposed compilation, as such, may have all the excellence its friends claim for it. How long will it stand, and how and by whom is it likely

to be changed? Of what material are our legislatures generally composed? How are their members nominated, and upon what qualification chosen? By what considerations are they principally moved, and by what influences controlled? What is their competency on the whole, not merely to regulate the machinery by which the details of local government are carried on, but to prescribe and ordain for a great country the general law of the land? These questions answer themselves. We know that such bodies do not command public confidence; that their sessions are viewed with apprehension, and their adjournments with a feeling of relief. In several of the states whose legislation I have endeavored to review, resolutions appear in their session laws providing for the investigation of charges of bribery and corruption against their members. In others, new statutes aimed at such offences have been thought necessary. In others still, the newspapers that contain the official publication of the laws, contain on the same sheet denunciations of the corrupt and venal means by which, as it is declared, the passage of some of them was obtained. It is not for me to say to what extent these charges are true. In some states, fortunately, they have no application, but we know that in other states they are widely believed to be true.

Even in those legislatures whose integrity is unquestioned, the perusal of their labors is rarely calculated to inspire confidence in their wisdom. In the majority of them—happily not in all—the session laws exhibit hasty, inconsiderate, ill advised legislation, framed to meet the real or supposed hardship of some particular case, to further some private end, or to reflect some temporary gust of popular feeling; they are characterized by a tendency to extend legislation to all manner of subjects, as well without as within the domain of municipal law, making a new statute the remedy for all ills and all inconveniences; by a looseness and ambiguity of expression that leads to endless uncertainty and litigation; and last and worst, by a fluctuation of purpose that deprives statute law of all stability, and alters, amends, reconstructs, and repeals its enactments from year to year, more rapidly than the courts can grope their way to a construction of the language in which they are couched.

### Madison on the Western People

(From Annual Address by John W. Stevenson\* of Kentucky in 1883.)

Mr. Madison was stern, yet attractive in the social circle; especially felicitous in his personal reminiscences of prominent men and interesting incidents in his personal life. I remember as though it were yesterday my last interview with this grand old man, in October, 1835. With his velvet cap upon his head, and lying on his lounge in his sitting room at Montpelier, I went in to bid him good-bye, half an hour before the stage-coach arrived, which was to bear me from my native state in search of a new home in the far west. He took me by the hand, and inquired of me in what part of the west I proposed to locate myself. I told him I had not yet determined. He replied, "I think, my son, your determination is a wise one, to seek a new home in

\*President American Bar Association 1884-85.

the great west. That great Western empire is ultimately to control the destinies of our country, and it is judicious in you to grow up around the people among whom you expect to live." And then added, "The Western people are patriotic, prosperous, and of noble physical development, and are possessed of strong native judgment. Especially is it true that the western women are intellectual, handsome, and practical. I must give you, in proof of this, an incident in my early and only visit to a Western state. I was called by business to Ohio, at an early day. We were travelling in a common mail-coach, in extremely cold weather, and, despite of blankets and straw, felt the effects of a freezing atmosphere. About sunrise we stopped at a neat, comfortable country inn, which we were told was the breakfast house. My companions and myself went in, and were met by a cozy and polite landlady, who welcomed us cordially, saying, 'Gentlemen, come in into the fire. You seem all to be very cold. Perhaps you would like to have a Samson before breakfast.' None of us comprehended what a Samson was; but as she connected it, in a remedial sense, with our frigid condition, I replied, 'Yes, madam, we will be obliged to you for a Samson.' Quickly looking at us, she replied, 'Will you take your Samson with the hair on or with the hair off?' Here was a poser, and we were all silent for a second. Remembering that Samson was strong with his hair on, and weak with his hair off, I replied, 'By all means with the hair on.' In a short time she returned with three strong hot toddies, which we found grateful to our condition, and after an excellent breakfast left on our travel."

### Judge-Made Law

(From Presidential Address by Alexander R. Lawton, of Georgia, in 1883.)

Much has been said, and sometimes flippantly, of the encroachments by "judge-made law." Even though such accusations are not entirely without foundation, how much has been thus done in the announcement of truths and principles of action from the bench, which now constitute the treasury of the law! If Lord Mansfield made the law merchant of England—which also became that of America—if Chief Justice Marshall made the constitutional law of the United States, as has been charged, how well did they build! Who so rash today as to question the amazing skill and complete success of those peerless architects! How many decades and how many legislatures, composed each of hundreds of men, would it take to establish such principles, and work out such beneficent results, and insure their acceptance by the coming generations!

(From Remarks of Charles C. Bonney, of Illinois, at Sixth Annual Meeting, 1883.)

We have listened to severe censures of judge-made law and judicial legislation. What is the meaning of these terms? Judge-made law consists of judicial expositions of the various doctrines of jurisprudence as found in, and illustrated by adjudged cases. Of this there is fortunately very much. Judicial legislation consists of arbitrary rules, not existing in the nature of the relations involved, but asserted and applied by the court without warrant of principle or of law. Of this there is fortunately very little. Of judge-made law, the text books on

commercial law, the law of contracts, the law of common carriers, the law of evidence, and, without enumerating other branches, the jurisprudence, pleadings, and practice of equity largely consist. We owe little in all these departments to legislative enactment. They are the result of the evolution and development of the law under judicial exposition. This is even more true of constitutional law. The human intellect has never reared a nobler edifice than the American system of constitutional jurisprudence. It has risen under the hands of its master builders, with a harmony, strength and beauty, as fascinating to the lawyer and the judge as is the matchless Cathedral of Milan to the eye of an architect or poet. . . . I close with a repetition of the noble tribute of the President's address to that greatest expounder of the Constitution, John Marshall. We cannot match his judicial expositions of the great powers of government by any chapter of legislative achievement.

### Dissenting Opinions

(From Paper Read by John F. Dillon at Ninth Annual Meeting, 1886.)

To keep the increasing bulk of case law within smaller limits, it has been suggested that dissenting opinions should not be published. But on what ground could this be justified? Who is authorized to assume that the majority are always right? Not infrequently dissenting opinions are the sounder. Such cases are always carefully considered and the majority and the minority set forth their competing reasons and submit them to the fair judgment of the bar. If a dissenting opinion is written it is a fact in the case, and its suppression or non-publication, simply because it is a dissenting opinion, can be justified on no ground either of principle or of public policy. Who shall establish a censorship over the publication of any class of judicial opinions? It seems to me that this cannot be done until we shall forget Milton's plea, in which he "rose to the height of the great argument," for the liberty of unlicensed printing. Even if we doubted the utility of the publication of the decisions of inferior courts or of dissenting opinions, I know of no principle on which their publication ought to be prohibited by the legislature.

### Criminal Prosecutions in America

(From Paper read by Simeon E. Baldwin\* of Connecticut in 1883.)

Much is said with us as to the rights of criminals; so much, that we almost forget that the state has rights against criminals and against those charged with crime, on the maintenance of which the public life depends, and that it is mainly for their maintenance that the state exists.

"Sovereign Law—that state's collected will—  
O'er thrones and globes elate,  
Sits Empress, crowning good, repressing ill."

A sharp lecture was read last winter to the American public by a well known sociologist, on "The Forgotten Man." He was the hard-working, law-abiding, unobtrusive man, whom legislators forgot, in their zeal to help the poor, reform the vicious,

\*President American Bar Association 1890-91.

and grant relief to every interest that clamors and pushes for it.

The noblest feature of modern society is its attainments, not in science and art, but in humanity. We recognize the dignity and worth of man, as man, and recognize it even in the meanest and basest. There is but one temple on earth, says Novalis, and that is the body of man.

But there is a point at which humanity turns into sentimentalism. There is a point where selfishness—that is, putting forward self-protection as the first object—becomes a government.

The American system of criminal prosecutions is one which seldom convicts the innocent, but it is also one which often acquits the guilty. The proportion of acquittals to jury trials is probably three times as great as in England, and ten times as great as in Scotland or on the Continent. There are few civilized governments in which homicide is as frequent as in some of our western and southwestern states and territories; there are none in which convictions for murder are so rare.

The defendant has, under all systems of criminal justice, a great advantage in the matter of pleading. The prosecutor must formulate his charges with precision and accuracy; but the plea of Not Guilty leaves him utterly ignorant of the defense by which he is to be met. It may be an alibi, a justification, a claim of temporary insanity. Whatever it be, he learns it for the first time when the trial is begun, and must be ready to meet and disprove it on the instant, with no possibility of a postponement on the ground of surprise.

This embarrassment to the prosecution seems to be an inevitable one. Not so as to the embarrassments set up by our administration of the rules of evidence; for it is these rules which have grown into an artificial net-work, through whose meshes a well-defended criminal can so often slip.

I find no fault, again, with the fundamental principle that the state must satisfy the jury of the prisoner's guilt beyond a reasonable doubt. It speaks well for society when it can afford to say to a citizen who is pursued for a claim, however great, involving no moral wrong or civic degradation, you must pay it, if there is a bare preponderance of evidence against you; and yet say to the same man, if charged with crime, We will declare you innocent, unless we show that there is no hypothesis to be framed which is not inconsistent with your innocence. Only a free state can or will take this attitude. Perhaps no state which does not take it can be free.

But here is it not time to stop?

We have relieved the prisoner from the necessity, ordinarily imposed in civil cases, of pleading the nature of his defense. We have thrown upon the public a burden of proof heavier than it is thought just to impose on any private suitor. Why, at the same time, cut off the counter right which every private suitor has, of putting his adversary to his oath as to the merits of his defense? The historical reason we have already considered. If government can ask a prisoner to testify, they can require it; if they can require it, they can force a compliance. All such force our constitutions forbid; and far be it from any advocate of law reform to urge a recurrence to it; whether it be the Bavarian plan, now or lately in force, of giving only bread

and water to an accused who refuses to make a statement, or the more downright English methods of rack and thumb-screw, fine and imprisonment, discarded two centuries ago,

But between forbidding physical or moral compulsion, and inviting, or even urging a frank disclosure, the difference is wide. We have construed a prohibition to compel as a prohibition to request.

We assume a burden of proof unknown except where the English tongue is spoken; we demand an unanimity in the verdict equally unknown elsewhere; we often permit the jury—a thing unheard of in any other land—to go to their homes and mingle with the friends of the prisoner, while they are deliberating upon his guilt,—and yet we reject the aid of the simple expedient which would occur first of all to any child, of asking the accused what he has to say about the charge against him.

They are still jealous of their government in Great Britain. It is still a royal government, supported by an idle aristocracy; two of the estates of the realm ruling by no other right than that of birth. In prosecutions for political offenses, the interests of these two estates are directly involved, and to one of them the bench itself, in its highest places, belongs.

It is not strange, therefore, that, while not surrendering the procedure of preliminary examinations, close upon the arrest, they have been sedulous to require the magistrate to warn the prisoner that he need not answer, and that, if he does, his words may be used against him.

But with us, government has no other office or end than to order and protect the peace of society. The prisoner is tried before judges, and by prosecuting officers, who were, directly or indirectly, of his own choosing. The jury is made up of his neighbors; the law is one, directly or indirectly, again, of his own making. He has been, probably, educated at the expense of the state, for the very purpose of giving him the intelligence necessary to govern his conduct as becomes a good citizen. No private prosecutor, as in most countries, is pushing the case against him, for revenge or restitution. He has to contend only with the public, and the public have no interest except to discover the truth, whichever way it lies.

If, then, we would make the punishment of crime as certain here as it is in Europe—I might almost say, as it is in Mexico or China—let us abandon our attempt to fight it without the use of the ordinary weapons that lie at hand; without asking the man who, of all the world, knows best what the facts are, to tell us about them; and without asking him in such a way as to facilitate, rather than to prevent, an honest statement. Let him be brought before the examining magistrate, as he is abroad, before he has time to fabricate an explanation, before he has seen counsel when the proofs of guilt are fresh. Let him be confronted with these proofs, and asked how he can meet them. If he refuses to say anything, let it be so recorded. If he does speak, let all be written down in his presence, read to him, and signed by him, if he will. And let all be done, not as a matter of favor from him, but of right to the state. Let there be no caution that he need not answer, and no warning that he may be making evidence against himself.

# DEPARTMENT OF CURRENT LEGISLATION

## Legislative Correction of Criminal Procedure

By J. P. CHAMBERLAIN

"A CRIMINAL prosecution is more than a game in which the Government may be checkmated and the game lost merely because its officers have not played according to rule."<sup>1</sup> So saying Justice Stone struck a note which epitomizes the spirit of impatience with over-much technicality which is abroad in the public and which has had a marked effect on the legislation of 1927 dealing with the apprehension and prosecution of offenders. The legislatures which have acted have made vigorous attempts to smooth the way of judge and district attorney in arriving at the truth in respect to a particular criminal case. More explicit but containing much the same thought is the criticism of existing criminal procedure in the Report of the California Commission for the Reform of Criminal Procedure. Said the Commission:

"The old system was designed primarily for the protection of the defendant. It ignored almost entirely the rights of the public. The new system must protect all legitimate rights of a defendant, but at the same time must insure and protect, so far as possible, the great body of law-abiding citizens, the public."

It is evident that the public is determined to take up the problem of crime not alone from the old fashioned view that crime could be stopped by more severe punishment but on the more modern principle that speed and certainty in punishment are the more effective deterrent.

The recognition of the existence of the recidivist in the increasing punishment for second and third offenders is not new, but the public as represented in the legislatures believes that it is not enough to ordain longer incarceration for the habitual criminal, it is also necessary to provide ways and means of proving readily that a particular defendant has committed other crimes and the nature of the crime.

Merely local police records are not sufficient. Criminals travel and operate on a state-wide, indeed on a nation-wide, scale, so that the police must know more of a man's past criminal history than the local record gives. To extend the scope of the information service, state bureaus of criminal identification have been established in several states. In 1927 four states have joined the movement, Utah, chapter 84; Rhode Island, chapter 977; Indiana, chapter 216; and Minnesota, chapter 224. In Rhode Island and Minnesota the Bureau is put in the office of the Attorney General, in Indiana, it is placed under the Secretary of State, and in Utah, under a board composed of the Attorney General, a chief of police and a sheriff appointed by the Governor, who serve during their official terms. The Bureaus keep records of all persons convicted of felony in any state of the United States and well-known or habitual criminals. They have the co-operation of

the State Penal institutions, and each of the acts contains the requirement that persons arrested for serious offenses or who are wanted for serious crimes, usually specified, must be finger printed and their descriptions taken and filed with the Bureau. In Minnesota and Rhode Island these must be returned to a person who is not convicted provided it can be proved that he has not been convicted, in Minnesota, of a felony within 10 years preceding his acquittal, or in Rhode Island of an offense involving moral turpitude, without limitation of time. Minnesota has a further provision which will aid in securing criminal statistics; every peace officer is required to keep on a form prescribed by the Superintendent of the Bureau a permanent record of all felonies reported to or discovered by him within his jurisdiction and to report the facts and description of the defendant to the Bureau.

Rhode Island and Utah require, in addition to the information about individuals, that police authorities send to the Bureau a record of all stolen, lost and found property, thus creating a source of information on a state-wide scale, which should help in the drive on "fences," receivers of stolen goods, foreshadowed in the proceedings of the New York Crime Commission and the able report of the Grand Jurors' Association of New York county.<sup>2</sup>

Information collected by the Bureau is to be used in co-operation with other identification bureaus including the Federal Bureau at Washington. An interesting and up-to-date device is to be credited to the legislature of Minnesota, which authorized the Bureau to broadcast "by mail, wire and wireless" information as to wrong doers wanted, property stolen or recovered and other intelligence helpful in detecting or apprehending criminals. The legislature had in mind that the Bureau should broadcast to "Peace officers" but if a wireless is used it would seem at least likely that other persons more concerned with escape than capture would get the information.

The Superintendent in charge of the Bureau is appointed by the officer or Board in control of it. Utah requires him to have practical experience of criminal law and "knowledge of the science of finger print identification." Indiana demands that he shall have had five years' experience as a police officer and includes a stringent civil service requirement by obliging him to qualify as able to classify Bertillon measurements and fingerprints to the satisfaction of the fingerprint expert of the State prison.

Under the Minnesota and Indiana laws the Bureaus are given more extensive duties than those of a mere bureau of identification. Indiana directs its Bureau to co-operate with peace officers in the

1. McGuire v. United States, 47 Sup.C.R. 259, Jan. 3, 1927.

2. Report of the Grand Jurors of New York County, January 1927.

detection of crime and apprehension of criminals and on the direction of the Governor to conduct investigations to secure evidence against accused persons, and it makes provision for carrying out this duty in authorizing the appointment of an assistant Superintendent who must have five years' experience in practice of the law, to co-operate with prosecuting attorneys when so directed by the Superintendent. The members of the Association interested in legal education will be interested in knowing that the assistant must be a graduate of a school of law of recognized standing. Minnesota entitles its organ the Bureau of "Criminal Apprehension" and in carrying out its duty is required to "aid sheriffs on their request, in the co-ordination of their work with other peace officers in detecting and apprehending criminals and in enforcing the criminal law in the State."

Another way than checking on recidivists, in which records of criminals should be used and the aid they are to a judge in sentencing, is illustrated by New York, chapter 327. The act provides that before rendering judgment or pronouncing sentence the court shall cause the defendant's previous criminal record to be submitted to it, including reports of results of mental, psychiatric or physical examinations and, in addition, the court "may seek information that will aid the court in determining the proper treatment of such defendant."

The ease with which automobiles can be stolen and the convenience which the large market for used cars offers,<sup>3</sup> to dispose of cars feloniously acquired, have caused a general application to dealers in second-hand automobiles of the principle of licensing and the added requirement that they keep records of their purchases. In the current year, the legislatures of Michigan, chapter 171, and New Hampshire, chapter 53, have given local motorists this assurance of the will to protect their property, movable in law and more movable in fact. The same legislative device for discouraging theft and making easier the recovery of certain classes of stolen property, by keeping strict watch on merchants dealing in such property, has been applied to dealers in poultry. There has been much complaint of theft of farm produce, made easy by the speedy auto truck and the dark of the moon, and made profitable by quick sales in large city markets or to poultry feeding plants, so that the example of Minnesota, chapter 319, and Illinois, page 18, which requires of poultry dealers a license with a small fee, and strict bookkeeping, to show their transactions, may be the development of a campaign for such regulation. Colorado, chapter 85, does not compel a live poultry dealer to take out a license, but obliges him to keep a record of all poultry purchased and in addition to give a slip to the seller showing the number, class and breed of the birds with any distinguishing brand or other mark of identification. A copy of the slip must be preserved by the buyer and be given by him to the person who buys the fowl from him. Slip and record are open to inspection by peace officers.

Another indirect means of trapping malefactors by automobile is to be tried in Arkansas. Under act 223 of that state, repairmen must report to the police within twenty-four hours, the number and

the name of the owner or driver of any car brought to them which bears evidence of participation in a shooting affray or in a serious accident. Failure to report is a misdemeanor, with increasing penalty on second and third offenses. Smoke-screens may be useful and meritorious means of escaping the observation of an enemy fleet, but the lawmakers frown on their use by a speeding motorist to conceal his car and his number plates from vigilant peace officers and citizens. Merely driving or being in possession of a car equipped with a smoke screen device is made a felony in Vermont, act No. 78, North Carolina, chapter 64, and Maryland, chapter 520.

The statutes on the subject of bail show a determination on the part of the legislatures taking action to make both the granting of bail, and the enforcement of default a more serious business. New York, chapter 338, and California, chapter 737, impress upon the magistrate that the object of bail, a guarantee that the prisoner will appear for trial, cannot be accomplished without knowledge of the history of the criminal and of his character. A habitual criminal, perhaps knowing that he is wanted for other offenses which may appear if he remain under control of the police, should be treated very differently by the magistrate setting bail, from a motorist arrested for violation of an automobile law, whose whole record makes it almost certain that he will be in court on the date fixed for his appearance. California requires the officer giving bail to take into consideration the "seriousness of the offense charged, the previous criminal record of the defendant and the probability of his appearing at the trial or hearing of the case." Michigan, in its new Code of Criminal Procedure, number 175 of 1927, admonishes its magistrates in section 6, chapter V, that: "The amount of the recognizance shall be fixed with consideration of the seriousness of the offense charged, the previous criminal record of the defendant and the probability or improbability of his appearing at the trial of the cause." New York obliges the applicant to state whether a previous application for bail has been denied and the reasons for the denial. California reaches another of the scandals of bail bond practice by requiring the judge or magistrate not to accept a bail bond unless he is satisfied that no part of the consideration or security given or promised for it "was feloniously obtained by the defendant." So a court should no longer turn a defendant loose to steal the wherewithal to pay the premium on his bail bond.

Not only the case of the accused asking bail, but also that of the bondsman was dealt with. His responsibilities were made more serious, both in proving his sufficiency as surety and in enforcing his liability in case of forfeiture. New Hampshire, chapter 32, regulates professional bondsmen, defined as persons making a business of furnishing bail and receiving compensation for the service. The old notion of a bondsman as an acquaintance of the accused who is ready to warrant his appearance at the trial because of confidence in his character or some other personal hold, has disappeared from the modern criminal court, or at least become obscured, and the furnishing of a bail bond becomes a business matter just like any other surety bond. This new situation which recent criminal surveys,

3. Article by J. P. Chamberlain—"Protection for Automobile Owners," *American Bar Association Journal*, July 1925.

like those in Missouri and Cleveland, have made most clear, with its implications of political influence and ugly graft, is the reality to be faced by legislators. In New Hampshire a professional bondsman must be registered with the clerk of the court, and must furnish a statement under oath of his financial responsibility. He must keep the clerk informed of any impairment of his financial responsibility, and he will be guilty of a misdemeanor if he falsely represent himself to the owner of real estate. To protect accused persons from exorbitant charges, or perhaps, to prevent profits in the business becoming too attractive, the statute fixes the fee at not over five percent of the amount of bail furnished, and never over one hundred dollars. The Supreme Court may balk at this limitation of the charges in a recognized licensed business as they did in the case of the ticket brokers.<sup>4</sup>

California evidently is satisfied with the Act of 1923, embodied in section 1280a of the Penal Code, which requires a bail bondsman to set forth not only his real estate but also the encumbrances thereon and the number of bonds in which he has qualified within a year before the date of the affidavit. Chapter 736 extends this requirement to bail after indictment; it formerly applied only to bail before indictment. At least there will be possible publicity of the fact of over-bonding by practically irresponsible persons, a serious threat to the efficiency of criminal justice. Minnesota, chapter 233, obliges every personal surety to make an affidavit to be attached to the bond which states whether he is bound on other bonds and if so, the amount and name of the principal, and also lists his real estate with liens and encumbrances on it. The court may also require a list of his personal property. The personal friend who comes forward as bondsman is taken care of since the court may dispense with the affidavit if satisfied with the solvency of the surety. In case of a professional bondsman, the affidavit cannot be dispensed with. If the judges are strict in enforcing this law, and if they take advantage of the sections requiring a record to be kept by clerks, to pool information in respect to the amount of bail for which a professional bondsman is held, they can go far in keeping some relation between the property of a bondsman and the amount of bail on which he is surety, thus doing away with a crying evil in the administration of criminal justice. Indiana, chapter 132, strikes a blow directly at this evil by requiring a surety to swear that he is not already surety on a bond forfeited and unpaid. Michigan in its Code number 175 of 1927, chapter V, section 9, allows the Judge or magistrate to refuse to accept as surety a person already surety on any other bond pending in his court; a first blow, which may be followed by extending the rule to bondsmen in other courts, if a good system of filing all bonds in a city or district, be put into effect.

The recent surveys have shown that not only is there little consideration of the security offered by the bondsman when bail is accepted, but that he has little reason to fear at the other end that he will lose through enforcement of forfeiture.<sup>5</sup> This abuse the legislatures are trying to correct, so that "jumping bail" will become a serious thing

for bondsmen. California, chapter 735, made an advance by stiffening procedure in cases of discharge of forfeitures. Formerly either the defendant or the bail might appear to excuse the neglect of the defendant, but now both must come to court so that the plaintive solo of the bail, which has had so moving an effect in the past, will be heard no more in the halls of justice. Furthermore, the court must be satisfied that "the absence of the defendant was not with the connivance of the bail." A ground for an appeal by the bail for remission of forfeiture is taken away by California, chapter 734, which expressly sets forth that a dismissal of the indictment or information after default of the defendant shall not affect the obligation of the bail.

The remarkable output of criminal procedure legislation in California resulting from the activity of its Crime Commission, contains a further and important step on the road to better bail bond practice in forfeiture. The former law of California allowed the district attorney to proceed by action against the bail after forfeiture; chapter 734 of 1927 provides that if the court forfeiting bail would have jurisdiction in a civil action on contract in similar amount, it shall enter summary judgment against each bondsman for the amount in which he was bound within ninety days after the forfeiture. If the court had not such jurisdiction, then it must, within ninety days, give the bond and order of forfeiture to the district attorney who must immediately file it in a court having such civil jurisdiction in case of contract, and that court must forthwith enter judgment. Chapters 738 and 739 apply the procedure for summary judgment to bail given on the defendant's being held to answer and after indictment by the grand jury.

Two interesting acts put the control of bail on appeal in the trial court. New Jersey, by chapter 125, refuses bail pending prosecution of a writ of error, unless the defendant is given by the trial court a certificate that there is reasonable doubt of the validity of his conviction. In such cases he must be admitted to bail. Michigan by section 7 of Chapter V, of its new Code approaches the question in a different way. The section reads that in all cases where a writ of error shall be taken by the people the defendant shall be admitted to bail on his own recognizance, unless the trial court certifies that it is advisable that bail be required.

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Baltimore, Md.—The Norman, Remington Co., Charles St., at Mulberry.

<sup>4</sup> Tyson v. Banton, 47 Sup.C.R. 426.  
<sup>5</sup> Missouri Crime Survey, p. 197 ss.

# BUFFALO MEETING OF THE COMMISSIONERS ON UNIFORM STATE LAWS

By GEORGE G. BOGERT

*Secretary Conference of Commissioners*

**A**T the meeting of the National Conference of Commissioners on Uniform State Laws held at Buffalo, Aug. 23-29, 1927, the Chairman of the Legislative Committee, John H. Voorhees, reported the following adoptions of Uniform Acts during the year 1927:

AERONAUTICS ACT, Indiana, Maryland  
ARBITRATION ACT, North Carolina, Wyoming.  
BILLS OF LADING ACT, Delaware.  
CRIMINAL EXTRADITION ACT, Idaho, New Mexico, Pennsylvania, Utah.  
DECLARATORY JUDGMENTS ACT, Arizona, Indiana, Oregon, Wisconsin.  
EXTRADITION OF PERSONS OF UNSOUND MIND ACT, Hawaii.  
FEDERAL TAX LIEN REGISTRATION ACT, Delaware, Massachusetts, Nevada, New Mexico, Tennessee, Utah.  
FIDUCIARIES ACT, Indiana, New Jersey.  
FOREIGN DEPOSITIONS ACT, Wyoming.  
INTERPARTY AGREEMENT ACT, Nevada, Pennsylvania, Wisconsin.  
JOINT OBLIGATIONS ACT, Nevada.  
PROOF OF STATUTES ACT, Hawaii, Maryland.  
MOTOR VEHICLE ANTI-THEFT ACT, Idaho, North Dakota, Oregon.  
MOTOR VEHICLE REGISTRATION ACT, Idaho, North Dakota.  
MOTOR VEHICLES OPERATORS' AND CHAUFFEURS' LICENCE ACT, Wisconsin.  
ACT REGULATING THE OPERATION OF VEHICLES ON HIGHWAYS, Idaho, Michigan, Minnesota, North Dakota, Oregon, Pennsylvania, Washington.  
STOCK TRANSFER ACT, Colorado, Idaho, Utah.  
WAREHOUSE RECEIPTS ACT, Amendments, Nevada.  
WRITTEN OBLIGATIONS ACT, Pennsylvania.

The Conference finally approved the Uniform Real Property Mortgage Act which has been before it for about six years. This Act was later approved by the American Bar Association at the Buffalo meeting. It is a statute of forty-six sections largely concerned with the foreclosure of mortgages. The purpose and effect of the new Act have been described by the draftsman, Donald E. Bridgman, of Minneapolis, as follows:

"The Act furnishes a statutory short form mortgage that will, by the use of some 160 words in the short form, supply the place of and be equivalent to one containing about 1,000 words with all covenants in use, thus saving more than four-fifths of the records of mortgage and often extended to 4,000 words. The Act provides the equivalent covenants and clauses that become by statute a part of each mortgage. Short form mortgages of this character are found to be practical and are in nearly universal use in two states where the law provides adequate statutory covenants.

"It makes the mortgage a lien upon, instead of an estate in, the premises, leaving the right of possession in the mortgagor until foreclosure is complete. This is the law in the great majority of states; and in the minority, the mortgage is treated as a lien for most purposes.

"It provides a simple, inexpensive and efficient method of foreclosure without resorting to the courts, with ample protection to subsequent lienholders, which leaves the title clear, definite and unclouded. The method is 'foreclosure by power of sale.' It is an addition to foreclosure in court; and its use is optional. It has been found satisfactory after extensive use, and has been fully interpreted by the courts. It consists of foreclosure by power of sale so regulated as to prevent oppressive use and of a substantial period of redemption. It requires notice of sale to be given by mail to interested parties, but not so as to affect the validity of the title. In case there is a dispute about the mortgage, injunction may be easily secured and

foreclosure must then be in court. Statutory attorney's fees are provided, the amounts being bracketed for each state to fill in for itself.

"This method relieves courts and court records of foreclosure proceedings, and saves public expense. It meets a public demand to remove from courts matters that can be handled more expeditiously and economically in an administrative manner.

"It provides for a definite substantial period of redemption after foreclosure sale, and for the manner of exercising the right of redemption by both the mortgagor and subsequent lienholders. The period is not fixed and is not intended to be uniform. By filling in two words in the brackets in Section 25 the redemption period may be made anywhere from ten days to two years, according to the usages and requirements of the particular state.

"It provides for a state electing, by an alternative section, to apply these redemption features to foreclosure by suit or action in court.

"The Act provides for the treatment of trust deeds in the same manner as the ordinary mortgage. By slight changes, which are indicated, they may be excepted from the act.

"It provides a statute of limitations for outlawing mortgages that leaves the title unclouded by the mortgage because of some act or fact outside the record, a feature contained in only a few states.

"The Act does not cover generally the substantive law of mortgages.

"It does not interfere with or prohibit the foreclosure of any mortgage by suit in equity or otherwise by court proceedings, unless a state adopts the alternative form of Section 36, which regulates foreclosure in court in a number of particulars.

"It does not provide for foreclosure by power of sale of mortgages not containing a power of sale.

"It does not permit a power of sale in a mortgage or in a trust mortgage to be exercised in any manner except as provided by the Act."

The Conference approved six minor amendments to the Uniform Chattel Mortgage Act which had been adopted in 1926. The principal amendment requires greater formality in the execution of a chattel mortgage, providing that there must be two witnesses or acknowledgment by the mortgagor. The addition of these amendments will not cause confusion, since the Act was not presented to the legislatures in 1926 and has received no adoption by the States in its unamended form.

The Act Regulating the Operation of Vehicles on Highways, which had been approved in 1926, was amended slightly in three respects, namely, with regard to one vehicle passing another and with regard to horns which may lawfully be used.

Both of the sets of amendments above described were approved later at the Buffalo meeting by the American Bar Association.

The Uniform Business Corporation Act, which had in one form or another been before the Conference for more than ten years, was tentatively approved and will be brought up for final approval next summer. It is hoped and believed that none except minor changes will be necessary. The Act, prepared by Professor R. S. Stevens, of Cornell, in seventy sections, deals with incorporation, regulation, merger, consolidation, and dissolution of corporations for profit. The following

comment by the Committee which prepared the Act, on the general theory of the statute, is illuminating:

"The Committee has noted that the divergence of view in different sections of the United States concerning the attitude that should be observed toward the organization and functioning of business corporations, which was referred to in your Committee's Report for 1924 in submitting the Ninth Tentative Uniform Incorporation Act, is now less apparent, and that there are many evidences of a keen desire for a Uniform Corporation Act in sections where heretofore it has been considered as not feasible or as unworthy of serious effort to accomplish. Somewhat divergent attitudes toward corporations in the various states, of course, still prevail. These differences the Committee has recognized and has attempted to accommodate by bracketing certain portions of the Tenth Tentative Draft. In a further effort to reconcile these divergent views, it will be found that the present draft seeks to protect two fundamental interests, viz.: The interest which the shareholders have in unfettered self-control of the affairs of their respective corporations, and the important interest which the public has in being safeguarded against fraudulent use of the corporate device or fraudulent manipulation of the privileges which are extended to the shareholders. Where these two interests appeared to come in conflict the Committee has regarded the public interest as predominant and has sought to protect it. An example of this will be found in the provisions of the Act relating to the publicity required to be given to the facts bearing upon corporate financing.

"On the other hand, the Committee believes that most of the existing statutes put unnecessary restrictions upon the methods and the formalities that attend corporate action; that shareholders being parties to a contract between themselves should be free to arrange by contract the things that may be done and to determine such questions as the vote or other formalities required to do them. Accordingly, wherever possible, the present tentative draft gives to shareholders freedom of self-control and provides that the regulations for corporate management therein prescribed shall prevail only to the extent that shareholders themselves have not made their own regulations in the articles or in the corporate by-laws. Examples of this will be found in Section 27 with regard to preemptive rights; in Section 29 with respect to holding shareholders' meetings within or without the state; in Section 30 as to voting rights; in Section 32 as to fixing a quorum; in Section 33 as to the number, classification, time and manner of election of directors.

"The present draft for the first time attempts to employ the Uniform Act to produce harmony in the law upon certain important topics concerning which court decisions are now in conflict. A notable example occurs in connection with the general subject of *ultra vires* and the Committee felt that in that field the opportunity for uniform legislation should not be omitted.

"The *de facto* doctrine which was originally a matter of case law is now covered by a statutory provision in nearly every state. Section 9 of the present draft deals with that doctrine.

"Other instances in which this tentative act attempts to deal with existing conflicts in case law are found in relation to the following subjects: the liability of subscribers for shares in a corporation to be formed and the rights of the corporation against them after its formation (Sections 5 and 6); the liability of shareholders for dividends wrongfully paid out of capital (Section 26); the relation of the directors to the corporation (Section 35); the right of shareholders to inspect corporate books (Section 37); various matters incident to mergers and consolidations (Sections 45-50); with relation to the effect of compromise arrangements in the course of reorganization of an insolvent corporation (Section 61), etc. Particular attention also has been given to provisions covering financial features; the time and method of payment for shares, the valuation of consideration to be received for shares, the issue of certificates of stock, the liability of shareholders with respect to shares, and of any other persons who violate any of the provisions of the Act (Sections 13-26). It is believed that these sections give a liberal amount of freedom to the corporation and at the same time a high degree of security to the shareholders, creditors and the investing public. Of utmost importance from the viewpoint of the Committee are, first, the requirements for publicity as to corporate finances as an essential counterpart to the sanctioned use of no par value shares, and second, the limitations on the right to declare dividends."

The Conference also tentatively approved the Uniform Public Utilities Act, which originated in the

Public Utilities Section of the American Bar Association about four years ago and has been subjected to study and criticism in the Conference for the past three years. This Act will also be brought up for final consideration next summer. It consists of seventy-four sections covering the regulation of public utilities and a short statute of ten sections governing the issuance of securities by public utilities. Professor E. B. Stason of the University of Michigan Law School has been the draftsman. The following extract from the report of the Committee representing the latest draft summarizes the statute:

*"(a) The public utilities included within the Uniform Public Utilities Act.*

"1. Those producing, generating, transmitting, distributing, delivering, or furnishing gas, electricity, steam or any other agency for the production of light, heat or power.

"2. Those diverting, developing, pumping, impounding, distributing or furnishing water.

"3. Those transporting freight or passengers for hire for the public by street, suburban or interurban railways.

"4. Those transporting freight or passengers for hire for the public by motor vehicles, but not including taxi-cab service in cities or towns or truck service operating in cities or towns.

"5. Those transporting or conveying gas, crude oil or fluid substance by pipe line for hire.

"6. Telegraphs and telephones.

"7. The above services, whether privately or municipally owned. Some public utilities acts include additional public services.

*"(b) Duties and restrictions imposed upon utilities coming within the act.*

"1. All rates must be just and reasonable.

"2. Every utility shall furnish adequate, efficient and reasonable service.

"3. Every utility shall file a schedule of rates with the commission.

"4. No utility shall depart from the schedule so filed.

"5. No utility shall grant unreasonable preferences, or maintain unreasonable differences in rates or services between localities or classes of service.

"6. No change in rates shall be made except on 30 days' notice to the commission.

"7. No new construction or extension of service, with certain exceptions, shall be entered upon without a certificate of convenience and necessity first being obtained from the commission.

"The various public utility acts contain many other provisions of minor relative importance. There are, however, a few matters of considerable importance covered by some of the acts which are not treated in the proposed Uniform Act.

"One of these is the fairly common provision that a public service company may issue stocks, bonds, notes and other evidences of indebtedness only for certain specified purposes and then only upon an order of the commission authorizing the same. This feature is, however, covered by the companion act submitted in connection with this Public Utilities Act. Another is the provision that a utility may not sell its franchises or other property, nor may it merge or consolidate with other utilities except upon the authorization of the commission.

*"(c) Powers conferred upon the commission by the Uniform Public Utilities Act.*

"1. To investigate new schedules and proposed changes in rates, and either to confirm proposed schedules or determine the reasonable rates to be charged.

"2. To determine and fix just and reasonable rates.

"3. To order inter-connection of telephone and telegraph lines.

"4. To determine and fix reasonable, safe, adequate and sufficient service.

"5. To ascertain and fix reasonable standards, classifications, regulations, etc.

"6. To make valuations.

"7. To establish a system of accounts.

"8. To make examinations and tests on the utilities' premises.

"9. To require utilities to file annual and special reports.

"10. To conduct investigations of public utility problems.

"11. To issue or withhold certificates of convenience and necessity.

"12. To determine compensation due the utility if purchased by a municipality.

"13. To inspect books, records, documents, etc.

*"Security Issue Regulation.*

"As heretofore stated, the matter of Security Regulation is not covered by the Uniform Public Utilities Act, but, instead, is treated in a separate bill submitted by the Committee as a companion measure to the Utilities Act. The Committee thought it advisable not to include securities regulation in the Utilities Act because of the fact that such regulation involves a different type of regulatory function than that usually performed by public utilities commissions, and also because of the fact that very considerable controversy exists in different quarters over the details which should appear in statutes regulating security issues."

Other proposed uniform acts on which progress was made at the Buffalo meeting are the Sale of Securities Act, Trust Receipts Act, and Mechanics' Lien Act. Professor Williston presented for the first time twenty-four proposed amendments to the Negotiable Instruments Law, the result of suggestions from judges, lawyers, bankers, and law teachers, made in the light of the construction of the Act for over thirty years.

The Uniform Firearms Act, approved in 1926, was brought up for reconsideration on account of criticisms of its provisions with respect to the possession and carrying of firearms and other matters. It was decided to give another year to the consideration of these criticisms.

## OUR COURTS AND FREE SPEECH\*

BY THOMAS JAMES NORTON  
*Of the Chicago Bar*

IN Harper's Magazine for September an article under this heading appears from Mr. John T. Flynn, a newspaper man, the general tenor of which may be comprehended from this extract:

"The judge need no longer be within earshot of his critics. His court need not be in actual session. For the purpose of suppressing his critics the court is always in session and the whole world is within his presence, and the lawyer or editor or publicist or public man who, thinking a judge fails in his duty as a public servant in some judicial proceeding, lets fly at his head, may expect to be called before the court where the injured jurist, in the quadruple role of victim, prosecutor, judge and jury, may bowl his enemy over with this deadly weapon of contempt."

In nine pages of criticism no case is definitely cited so that an interested person could follow it up for examination. One vague assertion is strung after another.

Permit me to bring the subject from the air to the earth. To demonstrate the utter falsity of the language quoted, and to prove that the judge on the bench is subject to the severest supervision in contempt cases, I simply show to your readers from a recent decision (*Cooke v. United States*, 267 U. S., 517) of the Supreme Court of the United States in a thoroughly litigated case what is the law of the land on the subject.

A District Court of the United States had punished a man for contempt, a Circuit Court of Appeals had affirmed the order, and the Supreme Court reversed them both.

As the reader of an article is entitled to have the facts and to draw from them his own conclusions, instead of having the notions, lack of information, or prejudices of the writer thrust before

him, I shall let him get the truth of the subject by quoting at some length the salient language of the Supreme Court of the United States, first giving the essential facts set out by Chief Justice Taft in advance of the opinion written by him for a unanimous court.

An attorney wrote a judge, the next day after a verdict by a jury for \$56,000 against his client, but while the case was yet pending. While the court was open and engaged in the trial of another cause, and during a ten-minute recess for rest and refreshments, the defendant, by the direction of the attorney, delivered to the judge in his chambers, adjoining the court room and within a few feet of it, the letter, asking "personally and as a lawyer interested in the cause of justice and fairness" leave "to suggest that the only order that I will consent" to entering in several coming cases was one certifying the court's "disqualification on the ground of prejudice and bias to try" those cases.

The attorney said that he wrote the letter to avoid taking "the steps necessary to enforce the foregoing disqualification." He said that prior to the trial just concluded he believed the court "was big enough and broad enough to overcome the personal prejudice against the defendant," but "I find that in this fond hope I was mistaken." He spoke of slanders against his client whispered in the ears of the court, thus intimating that the court was affected by things not heard on the bench. There was more of the contemptuous sort.

The Court took eleven days to consider, with assistance of counsel, and then arrested the attorney and the defendant and sentenced both to thirty days in jail, which the Circuit Court of Appeals (295 Fed. 292) sustained.

In reversing the Circuit Court of Appeals the Supreme Court said:

"Considering the circumstances and the fact that the case was still before the judge, but without intending to foreclose the right of the petitioner

\*This article was sent by Mr. Norton to Harper's Magazine as a reply to the article by Mr. Flynn, but the editor of that magazine declined to publish it.

[the attorney] to be heard with witnesses and argument on this issue when given an opportunity, we agree with the Circuit Court of Appeals that the letter was contemptuous.

"But while we reach this conclusion, we are far from approving the course of the judge in the procedure, or absence of it, adopted by him in sentencing the petitioner. He treated the case as if the objectionable words had been uttered against him in open court.

"To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law. . . .

"Where the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument. . . .

"The proceeding in this case was not conducted in accordance with the foregoing principles. . . . The first step by the court was an order of attachment and the arrest of the petitioner. It is not shown that the writ of attachment contained a copy of the order of the court, and we are not advised that the petitioner had an exact idea of the purport of the charges until the other was read. In such a case, and after so long a delay, it would seem to have been proper practice, as laid down by Blackstone (4 Comm. 286), to issue a rule to show cause. The rule should have contained enough to inform the defendant of the nature of the contempt charged. Without any ground shown for supposing that a rule would not have brought in the alleged contemnors, it was harsh under the circumstances to order the arrest.

"After the court had elicited from the petitioner the admission that he wrote the letter, the court refused him time to secure and consult counsel, prepare his defense and call witnesses, and this although the court itself had taken time to call in counsel as a friend of the court. . . .

"The court proceeded on the theory that the admission that the petitioner had written the letter

foreclosed evidence or argument. In cases like this, where the intention with which the acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed, the court cannot exclude evidence in mitigation. It is a proper part of the defense. . . . We think the procedure pursued was unfair and oppressive to the petitioner. . . .

"The case before us is one in which the issue between the judge and the parties had come to involve marked personal feeling that did not make for an impartial and calm judicial consideration and conclusion, as the statement of the proceedings abundantly shows. We think, therefore, that when this case again reaches the District Court, to which it must be remanded, the judge who imposed the sentence herein should invite the senior Circuit Judge of the Circuit to assign another judge to sit in the second hearing of the charge against the petitioner.

"Judgment of the Circuit Court of Appeals is reversed and the case is remanded to the District Court for further proceedings in conformity with this opinion."

That makes it very clear that "the whole world" is not within the court's presence, and that the court is wholly lacking in power to "bowl his enemy over with this deadly weapon of contempt." As the opinion shows, a court is under very definite and severe restraint.

Moreover, Section 21 of the Judicial Code requires a judge to transfer a case to another court on affidavit filed that he has personal bias or prejudice. It was to avoid putting on record such an affidavit that the attorney, so he said, wrote the letter which the Supreme Court held to be very designedly contemptuous. Nevertheless, the trial court acted illegally in arresting him and practically not permitting him to be heard, when he should have been cited to show cause (by witnesses and any relevant evidence) why he should not be punished for contempt.

The Supreme Court cites preceding decisions and quotes from them to show that the principles enunciated have always prevailed. The procedure of Blackstone's time (1758), which had been established to curb king-made judges, yet obtains in the United States.

No, free speech is less in need of guarding in this country than the truth.

## ALFRED HEMENWAY

By HON. JOSEPH F. O'CONNELL

*Member of the Boston Bar: Member General Council from Massachusetts*

ON October 25th last, there passed away at Boston a gentleman who, for sixty-four consecutive years, had been actively engaged in the practice of the law—Alfred Hemenway, one of the two surviving founders of the American Bar Association.

He was in his eighty-eighth year, having been born in Hopkinton, Mass., August 17, 1839, the son

of Fisher and Elizabeth Jones (Fitch) Hemenway. He was born in the house of his great-grandfather, Elijah Hemenway, who was graduated from Yale in 1765, and who had been the second pastor of the Congregational Church in Hopkinton. He was descended on his mother's side from the Rev. James Fitch, the first minister of Harwich, Connecticut, who was a brother of Thomas Fitch, Governor of

Connecticut from 1754 to 1776. Prepared for college in the high schools of his native town, he entered Yale and graduated in the class of 1861. He pursued his law studies in the Harvard Law School in the Class of 1863. Among his fellow students in the Harvard Law School was Simeon E. Baldwin who was later to be honored as one of the leaders of the American Bar, and also one of the founders of the American Bar Association.

Admitted to the Boston Bar in July, 1863, he began a practice of the law which was never interrupted until the latter part of August of this year when he was taken ill as he was about to prepare to attend the fiftieth anniversary of the American Bar Association in Buffalo in response to the invitation extended to him at the Denver meeting, July 15, 1926.

Mr. Hemenway was a conspicuous member of the Boston Bar for over half a century. The law firm of Allen, Long and Hemenway was held in the highest esteem by the Bench and Bar of Massachusetts. His partners were Stillman B. Allen, regarded as a lawyer of very brilliant parts, and John D. Long, for three terms Governor of Massachusetts and later Secretary of the Navy under the administration of President McKinley.

Public office held no attractions for Alfred Hemenway—neither did an honored place on the Bench. He was one of the very few lawyers in Massachusetts within the past half century who declined appointments offered to him to be Judge of the Superior Court and Supreme Judicial Court of Massachusetts. Although devotedly—yes, almost passionately attached to the profession he loved, Mr. Hemenway never lost interest in his Alma Mater and gave generously of his time and attention as a member and as President of the Yale Club of Boston.

He also was President of the University Club from 1900 to 1905, a member of the Union, Curtis and Abstract Clubs of Boston and a fellow of the American Academy of Arts and Sciences.

Alfred Hemenway was married to Myra Leland McLanathan in 1871. She died in 1896. No children were born to them.

It may be of interest to note that Ralph W. Hemenway of Northampton, law partner of President Calvin Coolidge, is a nephew of Alfred Hemenway, and the following telegram was received by him from the President on October 26th:

"We are very much distressed to learn of the death of Alfred Hemenway. It is a great loss to the Bar of Massachusetts. We send our heartfelt sympathy to you and all the members of the family.

(Signed) CALVIN COOLIDGE."

His attachment to the law as against all other activities was very pronounced and found recognition by the Bar Association of the City of Boston honoring him as President from 1905 to 1909. He was also President of the Massachusetts Bar Association, and Vice-President of the American Bar Association as well as a member of the Executive Committee for several years. Mr. Hemenway declined several times to permit his name to be suggested as President of the American Bar Association, always maintaining that this honor belonged to members of greater national repute.

In 1897, he was appointed by Governor Walcott the sole commissioner to draft an act embodying the principle of the Torrens system of land transfer,

and the act drafted by him is now the law of Massachusetts.

Many have consecrated themselves to the practice of the law from the days when the nobility of the Roman mind first endeavored to obtain justice by law, and many yet to come will follow the same high purpose and impulse, but it may well be doubted if any of those who have gone before or those who will thus follow, will ever enjoy the fullness of a life in such a consecration as was that of Alfred Hemenway.

He was a typical lawyer in the finer meaning of the word. His attention to his work was a pleasure to observe. It was generally known among the Bar in Boston that he was the first in his office in the morning and the last to leave it at night, but this never seemed to make a drudge of him. He carried an equanimity about his work, both in the office and in the court room, that was rare to meet. Slow of speech,—courteous in manner,—patient to the amazement of all who met him, he never failed to cast a spell that the law had in him a most worthy expounder and champion.

And this was not the result of any aptitude for any special branch of the law. His practice was of a most general character. Coming to Boston an unknown boy without any influence or even business acquaintance, his rise in the profession was clearly attributable to the distinct mastery which he acquired over the many and varied classes of cases that gradually came to his office, and because of the ever growing repute that he would not go into Court until he had thoroughly mastered his case. His was not the success built on the labors of others,—he searched out the law himself—he wrote his own briefs,—he marshalled the facts in the cases he tried—he never sent others to do that for which his clients retained him. He loved the work and wanted to do it himself. Like a sculptor, he knew his tools and had his own model in mind. And his clients were many during those sixty-four years. His name is found frequently in the Reports of the Massachusetts Supreme Court. He was successful in the highest degree and sense of the word—yes, so successful that he will stand out for many years to come as one of the few lawyers who can be so classed.

It may not be inappropriate to state that Mr. Hemenway left an estate of upwards of one million dollars, and from those closest to him it can be safely stated that this represents the accumulated fees of an active business prudently invested. This did not represent, in any way, any particularly large fee, because he began practice at a time when fees were not very large and at no time was he connected with what is generally termed "The Big Interests."

The distribution of his estate indicates the great love that he had for his Alma Mater and for the law, along with a traditional and proper respect for his family. About \$300,000 of the estate is disposed of outright in public and private bequests and the residue is left in a trust fund the income of which is to be paid to certain relatives. After the termination of the trust, that is, upon the deaths of the relatives named, the trust is to be divided in equal shares—one-third to the heirs at law and two-thirds between the Harvard and Yale Law Libraries. Harvard and Yale receive outright be-

quests of \$50,000 each and ultimately will receive, it is estimated, about a quarter of a million each.

To the writer, he was the ideal representative of the educated gentleman. He harbored no rancor—he knew no racial or religious bias. The latest immigrant to our shores was as graciously treated by him as was any descendant of the earlier settlers from whom he had descended through a long, honorable line. A member of the faith of the earlier rulers of the old New England Colonies, he never questioned the right of every other citizen to worship God as he pleased. Born of a line that had never been located outside of New England, he had no such parochial pride that held this splendid community any better than the rest of the United States. He was proud of New England, but equally glad that other Sections of the country had glories that were worthy of respect.

It will be a rich heritage to the Bar of the United States if those who study in the halls enriched by the generosity of Alfred Hemenway will carry into the profession and practise of the law the love and devotion to it from which he was never tempted to depart.

## Review of Recent Supreme Court Decisions

(Continued from page 632)

tice explained the reasoning supporting the present decision as follows:

Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. The measure in question operates to require a non-resident to answer for his conduct in the State where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights. Under the statute the implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the non-resident may be involved. It is required that he shall actually receive and receipt for notice of the service and a copy of the process. And it contemplates such continuances as may be found necessary to give reasonable time and opportunity for defense. It makes no hostile discrimination against non-residents but tends to put them on the same footing as residents. Literal and precise equality in respect of this matter is not attainable; it is not required. The State's power to regulate the use of its highways extends to their use by non-residents as well as by residents. And, in advance of the operation of a motor vehicle on its highway by a non-resident, the State may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use. That case (i. e., *Kane vs. New Jersey*) recognizes power of the State to exclude a non-resident until the formal appointment is made. And, having the power so to exclude, the State may declare that the use of the highway by the non-resident is the equivalent of the appointment of the registrar as agent on whom process may be served. The difference between the formal and implied appointment is not substantial so far as concerns the application of the due process clause of the Fourteenth Amendment.

The case was argued by Mr. George Gowen Parry for the plaintiff in error.

### Contributory Negligence

It is a good defense to an action against a railroad company for damages as a result of death at a railroad

crossing if the deceased fails to stop and at his own risk ascertain whether or not there is a train approaching the crossing.

*B. & O. Railroad Co. v. Dora Goodman, Admrx.*, Adv. Op. 22; Sup. Ct. Rep. Vol. 48, p. 24.

The decision in this case has provoked quite an extraordinary amount of comment in railroad circles and in the press. It seems to be regarded as a new and startling announcement which will work a revolution in the law with regard to railroad liability for death at crossings. Many of the railroad presidents have commented on it as establishing new protection and one of them is reported as having said that it will put a very considerable stop to the elevation of grades at street crossings.

It will be seen that the case goes in principle not one step beyond the old established maxim that one about to cross a railroad track must "Stop, Look and Listen" and the equally well established and familiar proposition that there could be no recovery where the conduct of the injured person materially contributed to his injury.

The deceased was driving an automobile truck along a public highway at a rate of 10 or 12 miles an hour and as he approached the crossing he cut his rate down to 5 or 6 miles at about 40 feet from the crossing. The view of the track was somewhat obscured by a section house on the driver's left and a clear view could not be had of the whole track in that direction until the arrival at a point about 20 feet from the first rail. A train was coming from the left at a speed of not less than 60 miles an hour. The deceased was unable to stop his truck after he saw the train, was struck and killed.

A suit was brought by the widow and administratrix. The defense interposed was that the negligence of the deceased caused the death. At the trial the railroad company moved for a directed verdict in its favor. This motion and others of like character were refused. The plaintiff got a verdict and a judgment which was affirmed by the Circuit Court of Appeals. The case was taken to the Supreme Court of the United States on writ of certiorari and the judgment reversed.

The opinion was delivered by Mr. Justice Holmes who announced the views of the court in the following language:

We do not go into further details as to Goodman's precise situation, beyond mentioning that it was daylight and that he was familiar with the crossing, for it appears to us plain that nothing is suggested by the evidence to relieve Goodman from responsibility for his own death. When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. If at the last moment Goodman found himself in an emergency it was his own fault that he did not reduce his speed earlier or come to a stop. It is true . . . that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the Courts. . . .

Case argued by Mr. A. McL. Marshall for petitioner and Mr. Robert N. Brumbaugh for respondent.

# BRIEF HISTORY OF INCOME TAXATION

Growing Importance of the Subject of Income Taxation in the Various States—Commonwealths Which Have Already Adopted This Method of Raising Revenue—Income Taxation in Ancient Countries—Modern Trends—The System in England—Income Taxation in the United States

BY CHARLES R. METZGER

Member of the Indianapolis Bar

**D**URING the past twenty years, the taxation of incomes has become the subject of considerable importance among the citizens of the United States and the several states embraced therein. At the end of 1926, in addition to the federal income taxes, state taxation of personal incomes was in force in Delaware, Massachusetts, Mississippi, Missouri, New Hampshire, New York, North Carolina, North Dakota, Oklahoma, South Carolina, Virginia and Wisconsin. At the same time taxes upon corporation income were assessed in Connecticut, Massachusetts, Mississippi, Missouri, Montana, New York, North Carolina, North Dakota, South Carolina, Virginia and Wisconsin.

During the recent sessions of the legislatures, proposals tending towards the assessment and collection of state income taxation were discussed actively in Iowa, Illinois, Indiana and several other states. In view of the widespread general interest in the subject of income taxation, it is to be noted that no attempt has been made in recent years to bring together a history of this form of taxation for the general reader. It is the purpose of this study to bring together briefly such a history for the information of students of this problem.

The historical phase of income taxation appears to fall logically into the following main divisions:

1. Income taxation in ancient countries.
2. The governmental trend towards this form of taxation in the past few centuries.
3. The development of income tax legislation in England. This is particularly important since many of the legal enactments of the United States have their origin in similar legislation in England.
4. The income tax laws of the government of the United States.
5. A study of the state income tax laws in this country with dates and reasons for their adoption or abandonment.

## Income Taxation in Ancient Countries

Probably the earliest historical mention of income taxes concerns their collection in Egypt in 1580 B. C. At that time, the collection of these taxes was one of the duties of the Grand Vizier.<sup>1</sup> It is significant to note that judicial and public officers were the ones who paid such taxes then. These classes have been more successful in recent years in securing for themselves complete and specific exemption from income taxation, in many instances. Aristotle is authority for the statement that there was an income tax levied by King Tachus in Egypt upon all employments.<sup>2</sup> These were

collected at the suggestion of the Greek general, Chabrais, in the period of about 357 to 390 B. C. There also appears to have been income taxation among the Greeks in the days of Solon (596 B. C.).<sup>3</sup>

Ancient Rome undoubtedly imposed taxation upon incomes. Many of the sources of such taxation are obscure at the present time but it may safely be presumed that rulings concerning these impositions were probably made from time to time by the emperors in their orders to the governors of the various conquered provinces, which were under the dominion of Rome. Gibbon mentions that in the time of Constantine the Great (306-337 A. D.) there was evidence of the use of torture in gaining the exact amount of the citizens' income for the purposes of levying taxes thereon.<sup>4</sup> Constantine abolished the use of racks and scourges for this purpose. During the reign of Theodosius (379-395 A. D.) there is reference to this form of taxation in Code Theodosius (I. XIII tit. i. iv.). Gibbon said, "With the view of sharing that species of wealth which is derived from art and labor and which exists in money and merchandise, the emperors imposed a distinct and personal tribute on the trading part of their subjects." Some exemptions were granted in the matter of time and place. An indulgence was also given to the profession of liberal arts. The general income tax upon industry was collected every fourth year and was termed "Lustral Contribution."

Judge Charles D. Rosa,<sup>5</sup> Tax Commissioner in Wisconsin, summarizes the ancient experiments in the following words:

"The income tax is by no means a new thing. It is as old as the tithes of Biblical times, and appeared later in the Roman *estimo*, the French *dixieme*, and the English tenth. . . ."

The exact records of the operation of these ancient income tax laws are no longer attainable. It is of considerable interest, however, to note that the political philosophy of early nations recognized incomes as a legitimate field for taxation.

## Modern Trend Towards Income Taxation

In order that the trend towards income taxation may readily be observed, a chronological list of important dates of income tax adoption is given as follows:<sup>6</sup>

1379—England graduated poll and income tax.

1447—Florentine Republic (Italy).

1. Breasted, *Ancient Records*, Vol. 9, par. 706.

2. Montesquieu, *De l'Esprit des Loix*, 1848, Book XIII, Ch. VII.

3. G. Bancroft, *Ancient Greece*, 1847, p. 143.

4. Gibbon, *History of the Decline and Fall of the Roman Empire*, Chap. XVII.

5. *The Theory and Practical Application of a State Income Tax*, published by the Indiana Farm Bureau Federation, 1926, p. 4.

6. A large part of the above data is summarized from Kennan, *Income Taxation*. Unless qualified, dates signify adoption of income taxation.

Note: This history was prepared by the author while he was collaborating with Professor Lionel B. Edie in writing "State Income Taxation" (Indiana University Publication—1926). The author acknowledges many helpful suggestions from Professor Edie in connection with the article.

- 1702—Austria, followed later by general law of 1849.  
 1724—Russia, classified poll tax with income tax features.  
 1799—England, Napoleonic Wars' income tax.  
 1815—England, repeal of income tax laws.  
 1834—Saxony, later general law upon subject in 1874.  
 1842—England, income taxation adopted continuing to present.  
 1861—United States, Civil War income tax adopted.  
 1861-65—Southern Confederacy income tax in effect.  
 1863-64—Finland, dropped in 1895, not sufficiently productive.  
 1864—Modern Italy adopted it.  
 1871-72—Germany, by component states individually.  
 1872—United States, repeal of Civil War income taxation.  
 1874—Saxe-Coburg.  
 1878—Philippines, under Spanish rule there.  
 1882—Norway.  
 1884—South Australia and Baden.  
 1886—India.  
 1891—New Zealand and Luxemburg.  
 1892—Alsace-Lorraine.  
 1892-93—Holland.  
 1894—Lippe-Detmold. United States passed laws which were declared unconstitutional in 1895.  
 1895—Victoria and New South Wales.  
 1896—Saxe-Altenburg.  
 1897—Sweden.  
 1899—Japan, Dominica, Brunswick and Hesse.  
 1900—Leeward Islands.  
 1901—Hawaii—law copied after United States Act of 1894.  
 1902—Spain, law approximating income taxation; also Queensland and Tasmania.  
 1903—Denmark, general laws adopted; also British Columbia and some of the German states.  
 1904—Panama and Cape of Good Hope.  
 1905—St. Vincent.  
 1907—Western Australia.  
 1909—Hungary; United States, income taxation of corporations.  
 1914—United States, general income taxation adopted.  
 1917—Canada adopted war income taxation.

In addition to the above countries, income taxation can be found also in France, Belgium and Switzerland. In these three countries, laws concerning income taxation have been passed by the smaller political divisions and are therefore not administered nationally.

Judge Rosa<sup>7</sup> has summarized recent developments of national income taxation as follows:

"An income tax in some form is now in successful operation in the following countries or some political division thereof, to wit: England, Germany, France, Belgium, Denmark, Norway, Sweden, Holland, Italy, Switzerland, Hungary, India, Japan, Hawaii, Canada, New Zealand, and the United States."

The unusually heavy expenditures occasioned throughout the world during the World War have led also to extremely high rates of taxation upon incomes. These have tended to be higher than ever imposed before. The example of the United States where taxes were imposed upon the largest incomes amounting to two-thirds of the entire income was typical of conditions in many other countries during the period. In this study it is impossible to go into the details of the various national laws. For historical purposes, it is desirable that a brief special study be made of income taxation in England.

#### Income Taxation in England

As was noted in the above list of important dates, the modern idea of levying taxes based upon income had its inception in England in 1379. This early law was a graduated poll tax based in part upon income. In reality, this was not a poll tax, in the modern application of the term, but was much more logically an income tax. Under this early law, the citizens of England were separated into various legal classes upon the

basis of their social position. Rank, condition of life, amount of property and size of income were the determining factors under that law. Taxes were then assessed upon the various classes. These taxes, general in scope, were applicable to all the members of a given class. Such taxes were imposed during the fifteenth and sixteenth centuries and proved to be of considerable fiscal importance.

From the modern point of view, the first law governing income taxation by that name went into force in England in January of 1799. This law was passed at the instigation of William Pitt, then Prime Minister and First Lord of the Treasury. Incomes were levied upon under four main schedules somewhat similar to the present English schedules. A certain part of income was exempt and there were allowances for children and life insurance policies. This earlier law was repealed to make way for Addington's Property and Income Tax of 1803.

This latter law was very similar to the present English law, having the Schedules A, B, C, D, and E for the classification of incomes. From 1806 to 1815, Pretty's Property and Income Tax Law was in effect. This was particularly a Napoleonic War revenue measure. It was highly productive of revenue, yielding £14,545,279 (\$70,690,056) for the year 1815, at which time it was repealed. There were no further income tax laws until the laws of 1842, introduced by Sir Robert Peel. Although originally regarded as a temporary measure, the term of this law was renewed from time to time and remains, in substance, upon the statutes of England today. Gladstone made several unsuccessful efforts to have it repealed. The World War made it particularly important to the government and rates have tended to rise.

Income is divided, in the present law,<sup>8</sup> into five main schedules according to the source from which income is received. These schedules are:

A. Profits from the ownership of corporeal and incorporeal hereditaments. (From the ownership of lands or houses.)

B. Profits from the occupation of lands. (From the use of land.)

C. From government securities, British, Colonial and Foreign. (Includes interest, annuities and dividends.)

D. Profits derived from trades and professions, foreign and colonial property, etc. (Professions, trades, employments, etc.)

E. Salaries and pensions in Crown and Public offices. (Remuneration from public offices.)

Incomes below £700 are favored in the rates while incomes above £5,000 are subject to super-tax. Unearned incomes, such as interest, are taxed more heavily than are earned incomes from trade, profession or employment. Deductions from gross income are allowed for life insurance premiums, contributions to charities or hospitals, repairs of lands or buildings and for wear and tear to machinery of business plant. There are also abatements which are substantially partial refunds of taxes paid, based upon the size of the income. There are also allowances for children under the age of sixteen years (£10 per year under the law of 1909).

The administration of the English law is rather complicated. Assessors leave blanks at the taxpayers' houses which must be returned within twenty-one days.

7. Ibid, p. 4.

8. Halsbury, *The Laws of England*, Vol. 16, pp. 607-91.

The assessors then check the returns, after which they are turned over to the surveyors, who may rectify any mistakes which appear in them. The surveyors are under inspectors who in turn are under the Board of Inland Revenue. There are also the General Commissioners who represent the taxpayers. The general commissioners have special commissioners working under them. The general commissioners, who must be property owners, are appointed by the Special Commissioners. All of these official boards and personages work together upon the matter of income taxation with the purpose of securing accurate returns and safeguarding the taxpayers' interests. All of the above work is simplified to a great extent by the collection of income taxes at the source in most cases. Revenues derived from income taxation are applied to general governmental fiscal expenditures.

The chief point of distinction in the English income tax laws is the collection of income taxes at the source. This avoids inquisitorial proceedings, and obviates the possibility of fraud or evasion upon the part of the taxpayers. It has been estimated that probably more than four-fifths of the tax in England is collected at the source.<sup>9</sup> The operation of the income tax laws in England appears to be highly successful and this form of taxation still constitutes one of the chief sources of revenue. Undoubtedly, the experience of England in this field has influenced, to a considerable degree, the legislation in the United States upon the subject of income taxation.

#### Income Taxation by the United States

The first national law upon the subject of income taxation, in the United States, was passed July 29, 1861. It was purely a measure designated to raise revenue for the unusually heavy expenditures during the Civil War. It became a law on August 5th of the same year. In its original form, the law imposed a tax of 5 per cent upon incomes of over \$1,000 annually. Before the original law went into effect, changes were made to 3 per cent on annual income of over \$800. Also 5 per cent was assessed upon the "income, rents or dividends accruing upon any property, securities or stocks owned in the United States by any citizen of the United States residing abroad." More favorable rates of 1½ per cent were applied in the cases of holders of Treasury notes and other securities of the United States.

In 1862, the exemption was lowered to \$600 and the 3 per cent tax retained on incomes up to \$10,000; from \$10,000 to \$50,000, the tax was 5 per cent; and above \$50,000, the tax was 7½ per cent. Other taxes were levied on railroad bonds; on banks, trust companies, savings institutions and insurance companies, on gross receipts of insurance companies; on salaries of United States officials; on incomes from advertisements in newspapers with over 2,000 circulation; on securities of the United States held by citizens of the country living abroad; and on income from general bonds, notes and securities of the United States. Numerous minor changes were made in the law throughout the period of the Civil War, as to rates and schedules.

The law of 1864 taxed all incomes between \$600 and \$5,000 at 5 per cent; from \$5,000 to \$10,000 at 7½ per cent; with a 10 per cent tax on all incomes above \$10,000. This same act placed a tax upon the gross receipts of railroad, canal, steamboat, express, insur-

ance and telegraph companies; on theaters, operas, circuses, bank deposits, lotteries, advertisements and stock dividends. With the end of the Civil War, the tax laws showed the lessened needs for governmental revenue. The law of 1867 provided for a tax of 5 per cent on incomes over \$1,000. In 1870, the law provided for a tax of 2½ per cent on all incomes over \$2,000, with the same tax applying to the income from corporate bonds of the companies mentioned above.

With the discharge of the more pressing war obligations, the need for income taxation disappeared and this was abolished in 1872. There exists some confusion as to the exact amount of revenue realized during the eleven years in which the income tax was collected. A fairly accurate approximation of the total collected was presented to the New York Legislature by Joseph H. Choate in 1910, at the time the ratification of the Sixteenth Amendment to the Constitution was being considered by that body. The figures given were that \$376,150,204 was collected from income taxation. During the entire period of eleven years, the Internal Revenue Department collected from all sources the sum of \$1,872,419,260. The amount collected as income taxes was therefore about twenty per cent of the total.

In the light of modern methods of administration of income tax laws, the administration during the Civil War period appears incomplete and inadequate. Proper information from the source was lacking, self-assessment was unreliable and there was undoubtedly frequent fraud and evasion. The administration was in the hands of assessors of the Internal Revenue Department, under the general direction of the Commissioner of that department. Originally, the returns were required to be made between May 1st and the 30th day of June, upon which latter date the tax was payable. In 1867, these dates were changed to March 30th and April 30th respectively. Penalties were provided for late filing or delinquency in the payment of the tax. All persons were required to make a return under oath as to income. Failure to make such return led to the assessor making the return for the person so failing to make same. False returns were punished heavily, and appeals in matters of assessment or penalty could be taken, for final action, to the Commissioner of Internal Revenue.

Although not known generally today, the Southern Confederacy passed income tax laws during the Civil War as revenue raising measures. These income tax laws were enacted in August, 1861, and remained in effect until the end of the war. A serious administrative mistake was made in leaving the collection of these taxes to the states. All annual incomes of over \$500 were assessed upon a progressive scale. Farmers were required to pay their income taxes in kind (farm products), a policy which caused wide dissatisfaction during the period of depreciating currency. Constitutional difficulties arose, since the Constitution of the Confederacy provided for apportionment. Little reliable data is available concerning the operation of these laws. They appear to have been fairly successful in producing revenue and supplies for their government, and ceased to operate at the end of the Civil War.

Following the repeal of the Federal income tax law of 1872, no further national efforts were made to levy or collect this form of tax until 1894. At this date, an income tax law was introduced as a part of the tariff act. This provided for a 2 per cent tax upon all incomes over \$4,000. Widespread agitation occurred throughout the country. The law was finally passed

<sup>9</sup> Monograph by Joseph A. Hill, Ph. D., in *Economic Studies*, Vol. 4, Publications of American Economic Association, pp. 272-287.

with the strong support of the Western and Southern sections of the country. Almost immediately, the law was brought before the Supreme Court, and its constitutionality was tested in case of *Pollock v. Farmers' Loan and Trust Co.* (157 U. S. 429). A brilliant array of counsel presented the questions involved before the court. Four questions were involved in the case:

First, whether a tax on income of real estate was a direct tax within the meaning of the Constitution, and therefore unconstitutional unless imposed by the rule of apportionment.

Second, whether a tax on income of personal property was a direct tax.

Third, whether the act infringed the rule of uniformity.

Fourth, whether the tax imposed upon income from State and municipal bonds was constitutional.

The clauses in the Constitution about which the argument centered were the following: "Representatives and direct taxes shall be apportioned among the several states which may be included within this Union according to their respective numbers, (which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons)."<sup>10</sup> . . . "No capitation or other direct tax shall be laid unless in proportion to the census hereinbefore directed to be taken."<sup>11</sup>

Five important decisions had been made by the Supreme Court prior to 1894, bearing upon the four points in controversy. The first was the case of *Hylton vs. United States* (3 Dallas, 171-1796), in which a tax on carriages was held to be not under the rule of apportionment but to be an excise or indirect tax. The second case was *Pacific Insurance Co. vs. Soule* (7 Wallace, 433-1868), in which taxes upon insurance premiums were held to be indirect taxes and therefore valid. The third case was *Veazie Bank vs. Fenno* (8 Wallace, 533-1889), where the tax upon state bank notes was held not to be a direct tax requiring apportionment. The fourth case was *Scholey vs. Rew* (23 Wallace, 331-1874), in which inheritance taxes were held to be valid because they were not direct taxes. The fifth case was *Springer vs. United States* (102 U. S. 586-1880), questioning the validity of income taxation. Some question exists as to the exact meaning of this latter decision but by many it was regarded as sustaining the right of Congress to levy income taxes without apportionment.

The first decision of the Supreme Court in the *Pollock* case was uncertain and unsatisfactory, there being equal division upon some of the questions involved. A rehearing and reargument was therefore ordered. After the rehearing of May 6, 1895, one of the justices reversed his original opinion. In the final decision rendered May 20th (158 U. S. 601), the court decided upon the constitutionality of the act upon all four points.

The opinion of the court was delivered by Mr. Chief Justice Fuller, a part of which follows:

"According to the census, the true valuation of real and personal property in the United States in 1890 was \$65,037,091,197, of which real estate with improvements thereon made up \$39,544,544,333. Of course, from the latter must be deducted, in applying these sections, all unproductive property and all property whose net yield does not exceed \$4,000; but, even with such deductions, it is evident that the income from realty formed a vital part of the scheme for taxation embodied therein. If that be stricken out, and also the income from all invested personal property, bonds, stocks, investments of all

kinds, it is obvious that by far the largest part of the anticipated revenue would be eliminated, and this would leave the burden of the tax to be borne by professions, trades, employments, or vocations; and in that way what was intended as a tax on capital would remain in substance, a tax on occupations and labor. We cannot believe that such was the intention of Congress. We do not mean to say that an act laying by apportionment a direct tax on all real estate and personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments and vocations. But this is not such an act, and the scheme must be considered as a whole. Being invalid as to the greater part, and falling, as the tax would, if any part were held valid, in a direction which could not have been contemplated, except in connection with the taxation considered as an entirety, we are constrained to conclude that Sections 27 to 37, inclusive, of the act, which became a law, without the signature of the president, on August 28, 1894, are wholly inoperative and void. . . ."

Mr. Justice Harlan, dissenting, said in part:

"The practical effect of the decision today is to give to certain kinds of property a position of favoritism and advantage inconsistent with the fundamental principles of our social organizations, and to invest them with power and influence that may be perilous to that portion of the American people upon whom rests the larger part of the burdens of the government, and who ought not to be subjected to the dominion of the aggregated wealth any more than the property of the country should be at the mercy of the lawless. . . ."

Mr. Justice Brown, dissenting, said in part:

"While I have no doubt that Congress will find some means of surmounting the present crisis, my fear is that in some moment of national peril this decision will rise to frustrate its will and paralyze its arm. I hope it may not prove the first step toward the submergence of the liberties of the people in a sordid despotism of wealth. . . ."

Mr. Justice Jackson, dissenting, said:

"The practical operation of the decision is not only to disregard the great principles of equality of taxation, but the further principles that in the imposition of taxes for the benefit of the government the burdens thereof should be imposed upon those having least ability to bear them. . . ."

Mr. Justice White, dissenting, said:

"It is, I submit, greatly to be deplored that after more than one hundred years of our national existence, after the government has withstood the strain of foreign wars and the dread ordeal of civil strife, and its people have become united and powerful, this court should consider itself compelled to go back to a long repudiated and rejected theory of the constitution, by which the government is deprived of an inherent attribute of its being—a necessary power of taxation."

It is of interest to note that in addition to the legal and historical precedents argued before the Supreme Court, in the above case, definitions from current economic literature were also presented to aid the court in reaching a decision. After this decision by the Supreme Court, there was little official attention given to the subject of income taxation until 1898.

As a part of the revenue acts for financing the war with Spain, a semi-income tax was imposed upon corporations in 1898. This tax was upon the franchises of corporations and was assessed in accordance with the annual gross earnings of the corporations. The measure of 1898 was attacked as to its constitutionality in the case of *Spreckels Sugar Refining Co. vs. McClain* (192 U. S. 397). The tax was upheld by the Supreme Court upon the basis that it was a purely excise tax measure. After the emergency occasioned by the Spanish-American War, the measure was repealed.

The national income tax measure next appeared in the Payne-Aldrich Tariff Act of 1909. This act authorized a special excise tax of one per cent on annual incomes of over \$5,000, of all corporations organized for profit. The hostility prevailing at that time towards trusts and larger corporations made this an auspicious time for such legislation. Arguments were

10. Constitution—Article I, Clause 5.

11. *Ibid.*, Article I, Section 9, Clause 4.

made before Congress that such a tax should be left to the states, since corporations are created by the states. It was also said that such legislation was discriminatory in favoring the partnership form of business organizations as against the corporate form. It was also said that such legislation was inquisitorial and was a direct tax which would make it unconstitutional. The proposed law undoubtedly had its inspiration in the old corporate taxes of 1898.

In spite of the arguments presented, the new corporation tax act was passed in 1909. At once, fifteen cases were brought before the Supreme Court to test the constitutionality of the new measure. These cases were argued as a group and the constitutionality of the law was upheld in the case of *Flint vs. Stone Tracy Co.* (220 U. S. 107). This law remained in effect until 1914, at which time it was merged with the income tax law of that date. During the four years of its operation, the following receipts were obtained by the government from this source: 1910, \$20,960,000; 1911, \$33,512,000; 1912, \$28,583,000; and 1913, \$35,006,000.

In 1909, the Sixteenth Amendment to the Constitution, providing for national income taxes, was passed by Congress and submitted to the several states for ratification or disapproval. It received the necessary three-fourths ratification by the states in time to be available when the Underwood Tariff of 1913 was under discussion. Due to reductions in tariff, income taxes were proposed upon all net annual incomes of over \$3,000 and \$4,000, in the cases of unmarried and married people respectively. Graduated surtaxes were also provided so that upon annual incomes of \$500,000 or over, a 6 per cent surtax would be applied. Numerous reductions were allowed in computing net income with which the general public is familiar. Collection at the source was also attempted.

During the financial stress of the World War, national income tax exemptions were lowered, tax rates were increased and surtaxes raised. At the peak of income tax rates, incomes of over \$2,000,000 bore a surtax of 67 per cent. The returns made for income tax purposes were also instrumental in the collection of the excess profits taxes which were highly productive of revenue. Since the end of the World War, there have been gradual reductions of income taxes. It seems safe to conclude that the present Federal income tax laws will remain upon the statute books in much their present form for an extended period of time.

#### State Income Taxation

In many parts of the United States, state income taxation is regarded as an innovation in methods of producing state revenue. However, there have been some forms of such taxation, existing in America, for several hundred years. Just how far back state income taxation can be traced depends largely upon what definitions of the term are accepted.<sup>12</sup> If the Colonial "faculty" taxes are to be considered as income taxes, their early application in this country must be considered. Faculty taxes were imposed upon citizens in regard to their particular trades, occupations or professions and the income received therefrom. Such taxes existed in Massachusetts in 1634 and have continued, with modifications, to the present time. These faculty taxes were collected in Connecticut from 1649 to 1819; in Rhode Island from 1649 to about 1750; in New Hampshire from about 1719 to 1794; in Vermont from about 1777 to about 1850; in Virginia, approximately

the same taxes, from 1777 to 1790; and in South Carolina from about 1701 to 1776. These faculty taxes were based upon ability to pay and may be classified conservatively as partial income taxes, in these states at least. Records of these taxes are too obscure to be of any present value, other than for the historical interest which attaches to them.

Of greater importance to the present study is the matter of strictly state income taxation in its modern sense. A brief presentment of these follows:

ALABAMA had such laws from 1844 to 1884, at which time they were repealed due to general hostility towards them and to faulty administration. An attempted revival in 1919 appears to have been unsuccessful since the law was declared unconstitutional March 20, 1920.

ARKANSAS passed very simple income tax laws in 1923 but these were dropped from the statutes shortly thereafter.

CONNECTICUT has had income taxation of corporation incomes since 1915.

DELAWARE had state income taxation from 1869 to 1871 upon certain businesses and professions. A license system was substituted at the time of their repeal. Income taxation was reenacted in 1917 and is still in force. Income taxation is directed only toward personal incomes.

FLORIDA had income tax laws from 1845 until 1855, but at the latter date they were abolished as unproductive of revenue. In 1924, the citizens of this state adopted a State Constitutional Amendment prohibiting forever the levying of any inheritance or income taxes. The amendment was adopted by a favorable vote over six times as large as the negative vote.

GEORGIA employed income taxation from 1863 to 1866 primarily as a means of securing funds for war purposes and for Confederate veterans and their dependents. It appears to have been highly productive of revenue but was dropped when the emergency had passed.

KENTUCKY had an income tax law applicable only to the interest from United States bonds from 1867 to 1871. This law was held to be unconstitutional and discriminatory in 1872, in the case of *Bank of Kentucky vs. Commonwealth* (9 Bush 46).

LOUISIANA imposed income taxation from 1865 to about 1898. This appears to have been an especially unpopular law which was productive of much litigation. The State Constitutions of 1879 and 1898 did not provide for the levying of such taxes<sup>13</sup> and the law was largely ignored by the taxpayers for a number of years. No authentic information is available as to its ever being repealed but in any event attempts to enforce it ended about 1898.

MARYLAND had income tax laws from 1842 to 1850. These were the cause of much dissatisfaction and evasion upon the part of the citizenship. They were regarded as a complete failure.

MASSACHUSETTS has had definite income tax laws since 1843, before which time the faculty taxes were imposed. The present application of the tax is largely upon the basis of laws passed in 1916.

MISSISSIPPI passed the income tax laws, which are still in effect, in 1912. Extensive modification of the laws was made in 1924.

MISSOURI had income taxation from 1861 to 1865, essentially as a war measure. This method of taxation

<sup>12</sup> See Dewey, *Financial History of the United States*, 1904, p. 11; also Kennan, *Income Taxation*, 1910, pp. 303-4 and notes.

was reestablished in 1917 and continues in operation at the present time.

MONTANA adopted a corporation license tax in 1917. This is based upon 1% of the net annual income received from within the state. It is still in force.

NEW HAMPSHIRE is operating under income tax laws approved May 4, 1923. The law applies to income from intangibles.

NEW YORK has had corporation income taxation since 1917, and personal income taxation since 1919.

NEW MEXICO had a rather hectic experience with income taxation. This principle of taxation was adopted in 1919. Great confusion was caused, so the legislature was convened in 1920 for the purpose of repealing the old law and passing an improved measure. The old law was repealed but the legislature declined to enact a new measure because of public antagonism to such legislation.

NORTH CAROLINA has had state income taxation since 1849. Over twenty complete revisions have been made of these laws since their original passage.

NORTH DAKOTA has had income taxation since 1919.

OKLAHOMA has had some form of state income taxation since the first law was passed in 1908. There have been numerous revisions since the original adoption.

OREGON had a very unsatisfactory experience with her income tax law which became effective January 1, 1923. A great deal of trouble and litigation arose over the statute. The law was repealed in 1925 with specific provisions that delinquent taxes for 1923 be collected, and that any amounts collected under such taxation for 1924 be returned to the taxpayers. A referendum upon this subject in the summer of 1927 led to its defeat.

PENNSYLVANIA tried state income taxation during the period from 1841 to 1871. At the latter date, these laws were repealed for the reason that they were unproductive of revenue. An emergency income tax was enforced upon corporations, patterned closely after the Federal laws upon the subject, for the years 1923 and 1924. This is no longer imposed.

SOUTH CAROLINA had income taxation from 1838 to 1868. Due largely to the adoption of a new State Constitution in 1868, this form of taxation was dropped. State income taxation was revived in 1898 and continued until 1918, when it was again abolished. Shortly thereafter, the income tax was adopted again and at present the tax is administered under the Act of March 13, 1922.

TENNESSEE had income taxation applicable to the interest from United States bonds beginning with 1883. This law was little enforced but apparently has never been repealed. Corporations pay a special excise tax amounting to 3% of the annual net income received from within the state.

TEXAS had partial income taxation from 1863 to 1871. Attempts were made in 1909 to reestablish this form of taxation but these were defeated due to popular feeling against them.

VIRGINIA has had state income taxation since 1843. There have been frequent revisions of the laws.

WEST VIRGINIA passed state income tax laws in 1863. These were never enforced and were repealed in 1864. Something approximating partial income taxation is enforced at the present time. This is the excise and sales or privilege tax in certain businesses only.

The tax is assessed upon the basis of gross sales, against both persons and corporations.

WISCONSIN adopted state income taxation laws in 1911 and these continue in force at the present time. They have served as models for subsequent legislation by other states. These laws may be regarded as the first of the recent state efforts to collect state income taxation.

Prior to 1911, state laws were considered failures, for the following reasons:

1. The method of self-assessment.
2. Indifference of state officials towards these laws and their enforcement.
3. General evasion of the laws by taxpayers.
4. The nature of the income against which taxes have been levied.
5. Lack of centralized administration.

The adoption of the Wisconsin law in 1911, providing for centralized administration, inaugurated the modern era of state income taxes.

At the present moment, the observer must note a distinct trend towards the taxation of incomes by the states. This is due largely to rapidly increasing state expenditures and to the fact that there is an extremely favorable attitude towards this form of taxation in the rural and agricultural parts of this country. This subject appears destined to become of the greatest importance in connection with the fiscal problems of the various states of the Union.

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#### Curious Survivals

Trenton, N. J., Oct. 5.—Joseph L. Dear of Jersey City shares with George Van Bushkirk of Hackensack the distinction of being the only layman on the bench of the highest court of the state—the only court in which laymen sit. They receive \$40 for each day spent in court. Although the constitution of 1844 empowers governors to appoint laymen to any court of the state, they have always been appointed to the Court of Errors and Appeals. This court renders its decisions by ballot rather than by individual opinion, being one of the few courts in the United States which does so.

—*San Francisco Recorder*.

18. See Report of Assessment and Taxation Commission (La. 1921) pp. 10-18.

## CONFERENCE OF BAR ASSOCIATION DELEGATES DISCUSSES IMPORTANT QUESTIONS

Nearly Every Strong State and Local Bar Association Represented at Buffalo Meeting—  
By-Law Adopted Making Hon. Elihu Root Honorary Member of Council for Life—  
Chairman MacChesney's Address Read by Substitute—Report of Committee on  
Rule-Making Power—Report of Committee on Judicial Selection Shows Many  
Associations Creating Machinery to Guide Voters—State Bar Organiza-  
tion Committee Sets Forth Progress of Movement—Spirited Debate  
on This Subject—Committee on Cooperation Between Press and  
Bar Presents Report—Committee on Admission to Bar Rec-  
ommends Thorough Investigation of Standards and Dis-  
cipline of Bar Throughout United States — Josiah  
Marvel Chosen Chairman

THE Buffalo meeting of the Conference of Bar Association Delegates, held Aug. 30, 1927, showed the Conference to be in a virile condition. Nearly every strong state and local bar association was represented, some sending a full quota of delegates and alternates. The fact that many of the delegates were former presidents indicated the choice of delegates truly representative of the organized bar of the country. The interest of the delegates was shown by patient attendance through two sessions lasting, together, about six hours. It was found advantageous in 1926 to have not more than two sessions and at the close of the last meeting the Council decided to bar the reading of printed reports in the future, and to provide discussions to occupy the time thus saved, so that varying and opposing views may be presented, and the program be made more interesting.

The election of officers resulted as follows: Chairman, Josiah Marvel (to succeed Nathan William MacChesney); Vice Chairman, Thomas C. Ridgway (to succeed John R. Hardin); Treasurer, Elias Gates (re-elected); Secretary, Herbert Harley (re-elected); Members of Council for four years, Harry S. Knight and Philip J. Wickser (succeeding Elihu Root and Charles A. Boston). The hold-over members of the Council, with the expiration of their terms, are: 1928, Henry U. Sims and Wade Millis; 1929, Reginald Heber Smith and Herbert S. Hadley; 1930, James Grafton Rogers and Joseph J. Webb. Nathan William MacChesney becomes a member ex officio for the coming year.

The Conference was the conception of Mr. Elihu Root and was inaugurated by him during his presidency of the Association in 1916. He first realized the need for a body to bring together co-operatively the American Bar Association and all state and local associations. It became a section of the American Bar Association in the revised constitution of 1919 and has been supported by the Association from the beginning. Subject to very slight limitations the Conference is an autonomous body of delegates. For a number of years its views on appropriate matters were, after discussion, formulated in resolutions of an advisory nature. Later

it has depended largely on committees continued from year to year, dealing with very serious topics, and tending more and more to extend their influence by appointing representatives in every state to aid in bringing about action in their respective states. It has thus become to a considerable extent an active propagandist body but with no power to bind any association. Its constituent delegates are given no power binding their associations.

In recognition of the great service rendered in the creation and subsequent fostering of the Conference in every way by Mr. Root, a by-law was adopted at the recent meeting making him an honorary member of the Council for life.

The committees reporting at the meeting were: Rule-making Power; Judicial Councils; Judicial Selection; Organization of the Bar; Co-operation Between Press and Bar; and Requisites for Admission to Practice. All of these committees had done a great deal of constructive work during the year and the sessions were mainly devoting to hearing their reports. The discussions in some instances were spirited.

The meeting was unfortunate by reason of the illness of its Chairman, Gen. MacChesney, who could not attend. Vice Chairman John R. Hardin presided.

In his absence Chairman MacChesney's address on The Leadership of the American Bar—Its Waning Influence and Suggested Causes and Remedies, was read by Mr. George Wilson, recently president of the Illinois State Bar Association. The address refers to certain profound tendencies of the time—the growing social solidarity of a machine age and the dwarfing of the bar as a whole and of its members individually in response to social and industrial pressure. The tendency is toward mass thinking and mass action and against individualism. In the bar this is particularly observed in the employment of numerous able lawyers as counsel for corporations that largely control their activities. The situation and the speaker's views are indicated by the following excerpts:

Is it not true that society, which we have helped to create, and which we, as a bar, have served so long, has become so complex and so great that no individual, or individual group

can any longer control or even guide it, but it has taken things in its own hands and dominates our lives?

Take the case of the Bar, for example. It has always been composed of men of strong individualities, and men have chosen it because it offered freedom of effort and ultimate leadership in various lines of life. The men in it have gloried in their individuality. It is no longer true. In this process not only has society, but the representatives of society and its established culture, through the university, and particularly through the law school, gradually been bringing men to a common mould. Once movements, business enterprises, organizations, were known by the men who represented them. Heads of them spoke with pride of their counsel. Today men are quite commonly described by the clients they represent, as though they were mere appendages.

The time was when the executive, hat in hand, humbly sought conference with the distinguished lawyer who acted as his counsel, and spoke with pride of his reputation. Today the same executive is quite as apt to punch the bell and ask to have the counsel step in. It is a question whether this is good, either for the Bar, or for business, or for that matter, for society, which each of them in their way are supposed to serve. It deprives the business man of disinterested advice and society often times of disinterested leadership. A lawyer friend of mine, full-time counsel of a great corporation, crudely referred to himself, in a public address one day, as a "kept attorney" no longer master of his own destiny and of equal dignity at the council table, but his talents and his opinions subordinated to the interests which he served.

I wonder if the time may not come in this country when the public, which has discredited the bar and its leadership at times because they have felt the opinions of its members were dominated by the retainers which they hold, will distinguish between those who are subordinates of the business by which they are employed, and those men who have achieved independence at the bar and who are primarily officers of the court, lawyers indeed, who have trimmed the lamps upon the altar of justice as priests in its temple, and who plead only those causes that appeal to them as proper ones for them to plead, and who cannot be told what to do. Unless some such distinction is made, it would seem that the process of deterioration of leadership is bound to go on.

I do not wish to be understood as decrying the ability of the full-time one-client attorney or counsel for they are very generally men of character and efficiency in their particular field. Often they are men of the widest culture, learning and ability. Yet they are in fact, are they not, particularly where they do not maintain offices of their own, but are subordinates in the offices of the corporation which they serve, executives of the business by which they are employed, rather than purely independent professional men? I wonder sometimes whether the real future of such a position is not in fact to regard it as an executive rather than a legal position with the future and financial rewards which come from such a relationship. Their position is superior to that of the impetuous type of lawyer seeking the crumbs from the business table, but yet it seems to me the public has come to regard them, perhaps properly so, as representatives of the business which they serve rather than members of the public profession of the law in a position to disinterestedly advise society as to its needs.

The ideal position for the lawyer to be in is to be able to tell his client without embarrassment what he should and ought to do, not to be in a position where he has to do what he is told by the client he wants done. Can one imagine a great surgeon being directed in his operations or methods by his patients in the way that oftentimes lawyers for business interests are directed by their clients?

The comparatively limited scope and narrowness of experience of the inside attorney, although he may have greater familiarity with the business, frequently leads to his being passed by when it comes to the selection of a general counsel. While there are, of course, numberless exceptions, it may be fairly stated that as a general rule a lawyer with only such limited training, when it comes to matters outside the routine of the business itself, does not have the experience and contacts to serve the business of which he is a part as effectively as independent counsel could do.

If, as I have pointed out, the decline in the leadership of the bar is not peculiar to it, but because of this general tendency in all of our society, the first step then toward the rehabilitation of the prestige and power of the bar is an assertion of its individualism, its freedom from subservience to clients, holding itself aloof from society intellectually, in order that it in turn may serve it.

And one of the first steps in this process of the reassertion of self-respect is the training of the young men coming to the

bar, not only in the technique of their profession, but in their attitude toward the public as well. This organization may well co-operate with its Committee on Admission to the Bar and its proposed investigation of methods of discipline for the enforcement of standards, not only in admission to the bar, but in conduct at it.

Would it be too much to hope that the time might come when a lawyer should not represent, before legislative bodies, commercial interests for which he is in fact not counsel, and for which he renders in fact no legal service, but only political manipulation?

And may we not ask, in the interest of cleaning house and to help re-establish the reputation of the profession, that where a lawyer appears before tax boards and the like on behalf of particular clients, he shall also represent them in other matters? To say nothing of the fact that such retainers as would not come to one in private practice, should not be accepted while occupying public office.

I venture to assert that the number of members of the bar, not to say lawyers, who are hired for their influence, rather than retained for their legal learning, is unfortunately largely on the increase. Unrevealed retainers are a fraud upon the public, for not only is a public office a public trust, which should prevent such a situation, but the influence of a private reputation which has inspired public confidence is likewise a public trust which should prevent a man from accepting a retainer influencing his judgment without revealing it to the public whom he seeks to influence.

### Report of Committee on Rule-Making Power

Mr. Josiah Marvel, chairman, presented the report of the Committee on Rule-making Power orally, saying that each of the eight members of the committee, namely: the Chairman, Roscoe Pound, Charles S. Cutting, Frank W. Grinnell, Edward W. Hinton, Charles S. Cushing, Thomas W. Shelton and Edson R. Sunderland, had contributed an article on the subject for a symposium which was published as a supplement to the AMERICAN BAR ASSOCIATION JOURNAL in its March, 1927, number. (Extra copies obtainable from the secretary's office.) Later the committee was fortunate in having the services of Miss Elizabeth Sheridan, who compiled the law, constitutional and statutory, with notes, in every state in a pamphlet of 119 pages. This was published at the expense of Chairman Marvel. (Copies may be had from the secretary or from Mr. Marvel.)

Chairman Marvel recommended that the committees on Rule-Making Power and Judicial Councils be merged inasmuch as it is desirable that rule-making and administration of judicial systems be treated as intimately related. The Conference approved the proposal.

### Committee on Judicial Councils

Mr. Frank W. Grinnell, Chairman, presented the report for the Committee on Judicial Councils, relating at some length the history of the movement with comment on the powers conferred in the various states and the nature of organization. The report indicated a rapid adoption of the judicial council idea as a means heretofore lacking for accomplishing most important work. The states which have created judicial councils are: Massachusetts, Ohio, Oregon, North Carolina, Washington, North Dakota, California, Kansas, Connecticut and Rhode Island.

### Committee on Judicial Selection

In the absence of Judge Irvin V. Barth, chairman, the report of the Committee on Judicial Selection was presented by Mr. Province M. Pogue, a member. It shows that many associations are creating machinery to effectuate the plan for guiding

voters in the choice of judges. The report follows:

*To The Conference of Bar Association Delegates:*

The first efforts made by the Committee on Judicial Selection toward the attainment of practical results were announced to the Conference at its session in Denver last year. They consisted in the appointment in each of the States and in the District of Columbia of a representative member of the bar whose duty it would be to see to it that his State or District Association would establish a central committee on judicial selection with the definite function of encouraging bar activity in this selective process. The forty-nine representatives have been at work, and although during the short period intervening but a comparatively few of the state associations have been called upon to take action in furtherance of the program, nevertheless report may now be made announcing most substantial attainments. We recite here very briefly the favorable action sponsored by the following State Associations:

1. The Wisconsin State Bar Association amended its constitution and by-laws so as authoritatively to provide for a new standing Committee on Judicial Selection. Such a committee has accordingly been appointed.
2. A Committee on Judicial Selection was established and appointed by the State Bar Association of Nevada.
3. In the State of Illinois, the Board of the State Association, heretofore deeming the matter to be of local import, caused our Committee's pamphlets to be furnished the various local bar associations throughout that State for their information and action.
4. The Missouri State Bar Association, which had heretofore recommended favorably the program as adopted by the Conference, has referred the matter to its appropriate committee.
5. The Washington State Bar Association authorized the appointment of a Committee on Judicial Selection. This committee has already been named.
6. The Maryland State Bar Association adopted a resolution by unanimous vote commending "to the various local bar associations throughout the State the establishment of Committees on Judicial Selection for the purpose of adopting practical means for the selection of the best equipped candidates for appointment or nomination to judicial position" and the Secretary was requested to send to the secretary of each of the local bar associations a copy of the resolution as adopted with a copy of the reports of the Committee on Judicial Selection of the Conference as appearing in the pamphlet, and further it was requested that the secretaries of the local bar associations report to the Secretary of the Maryland State Association "before the next annual meeting what action, if any, has been taken."
7. The California State Bar Association at its annual meeting appointed a Committee in accordance with the suggestion embodied in the reports of the Conference Committee.
8. In Michigan the State Bar Association acted favorably upon the recommendation of a special Committee on Judicial Selection and will provide for the appointment of a standing committee.
9. The Rhode Island State Bar Association favorably received the program of the Committee on Judicial Selection. That Association had, indeed, theretofore made provision for a standing Committee on Judiciary.
10. The Ohio State Bar Association unanimously endorsed the Conference program and the President of the Association was empowered to appoint a committee known as a Committee for the Selection of Judges.
11. At a meeting of the executive committee of the Arizona State Bar Association a resolution was adopted that steps be taken so far as possible in harmony with the suggestions of the American Bar Association to aid in the appointment of a Committee on Judicial Selection.
12. The State Bar Association of Utah has its standing committee on "Judicial Candidates and Nominations." The President of that association has announced that this committee would heartily co-operate with our Conference Committee on Judicial Selection.
13. In Wyoming the executive committee of the State Bar Association is co-operating with the Conference representative for that State to the end of securing candidates of high character for the bench and in some instances special committees have been appointed to assist in this work.
14. At a recent meeting of the Florida State Bar Association action was taken establishing a standing Committee on Judicial Selection to be composed of seven members.

This manifestation of co-operation in these fourteen States within the very short period available for possible action foreshadows a very general acceptance of the Conference Com-

mittee program. More than this, it bespeaks the active participation of the bar throughout the States in this process of judicial selection whatever be the occasion demanding action. We do not deem it of the essence that any particular method be employed for the exertion of this helpful influence—we do think it necessary, however, that in every State there be definitely established the machinery by which the bar may give expression. This end is now being accomplished. Each community will have its own conditions to consult, its own problems to solve—yet with a functioning agency of the bar ready to be summoned into action clearly the way is made for constructive effort. It is safe to say that the greatest assurance of progress lies in the creation of the agency intended both to mould thought and to direct action.

IRVIN V. BARTH, Chairman.

### Committee on State Bar Organization

A very full statement of the conditions of the bar integration movement was presented by Chairman Clarence N. Goodwin in his committee's report on Bar Organization. The report was supplemented with the text of a novel act recently approved by a convention of accredited delegates representing all the lawyers of Virginia. This act proposes to organize the entire bar especially to control admission to practice and discipline, leaving the existing voluntary state bar association as it now is. The bill will be urged for adoption by the next assembly. There were also model drafts of plans to federate bar associations under the Washington plan, the constitution providing the affiliation plan in effect in Minnesota, and replies from committee members to a questionnaire. (Copies of the report obtainable through the secretary.)

The report shows that bar integration is taking various forms, as indicated by progress in Washington and Minnesota, by a programme in Virginia, and by the addition of California to the list of states having statutory organization. The matter of stimulating growth on the part of voluntary associations was also presented. The scope of the committee's activities and advice was set forth in the following paragraphs:

#### Form of State Bar Organization a Problem for the Individual State

But the problem of what sort or form of organization is best adapted to the conditions existing in a given state is one which must be answered by lawyers of that state in the light of its own history and its own situation. It is not for this committee or even for this Conference to tell any state bar what it ought to do; its function is limited to the investigation of various kinds of organization, a statement of the facts with reference to their operation and development, the arguments urged in favor of a preference for each form and such constructive criticism as seems to be warranted by the facts disclosed.

It does, however, venture to say that no form of bar organization can be greatly successful unless it has the support and confidence of the bar as a whole, and the failure of some of our strongest bar associations to obtain statutory sanction for an all inclusive bar organization has been largely due to a lack of recognition of this principle. We are, as a body, conservative and unwilling to make any change unless and until the evidence of its desirability is overwhelming, consequently, where the leaders of the bar, convinced that official organization was desirable, upon receiving the approval of a majority of those present at the state association's meeting have attempted to secure the necessary legislation it has caused a feeling of revolt against what appeared to be "compulsion" instigated by a minority.

Your committee, therefore, suggests that no important change in state bar organization should be attempted, whether through statutory enactment, or change in constitution and form of organization, until the body of the bar has been convinced that such a change is desirable.

Statutory organization, as an example, has been generally obtained after the bar as a whole has been brought into substantial accord in favor of the change and this is also true,

we believe, of the successful attempts which have been made to federate the local associations with the state bar. Of the former, California stands out as an example. Legislative sanction for an all-inclusive organization was not attained until the matter had been thoroughly discussed in all localities and associations and the bar after a thorough understanding of what was proposed had become practically unanimous in favor of the law, and the newly organized state bar will start with the good will and support of practically every lawyer in the state.

Mr. Tunstall suggests that the report should contain a statement of what is meant by statutory or official organization of the bar. In a word it may be said that in England, Scotland, Ireland, Canada, France and in Continental Europe generally the bar has from time immemorial been considered a public body and it has functioned as such, selecting its council or benchers, calling candidates to the bar, administering discipline, and exercising powers of self-government.

In England, these powers are exercised by the Benchers of the Inns of Court by prescriptive right but in the United States there appears to have been no official or other organization of the bar until, following the example of the Association of the Bar of the City of New York, voluntary organizations began to appear which sometimes with legislative and sometimes with judicial sanction have aided the court in matters of admission and discipline.

Official State Bar Organization returns to the ancient idea of the bar as a public entity, all-inclusive, with power of self government and supplied with financial means through the payment of small annual fees. The five states, which have Bar Acts, however, quite properly, it is believed, made the bar's disciplinary powers subject to judicial review.

#### Mr. Louis Marshall's Address

Following the report on state bar organization Mr. Louis Marshall, representing opponents of the all-inclusive bar in New York, was given the privilege of speaking at length. Mr. Marshall set forth many reasons why the movement is opposed in his state. He declared it to be unworkable in such a large state, unfair to lawyers in the metropolitan counties, and destructive of years of effort on the part of voluntary associations, especially in the fields of bar discipline and legislative counsel.

Mr. Julius Henry Cohen, speaking for the New York lawyers who do not share the doubts and fears expressed by Mr. Marshall, followed with facts concerning the state of the movement in New York at this time. A more determined attack on the idea of inclusive official bar organization than that made by Mr. Marshall had not been heard by the Conference even at the special meeting in Washington in 1926. A more brilliant defense of the movement has never been made than Mr. Cohen's, and no such eloquence as his has been listened to since Mr. Elihu Root appealed to the Conference at its memorable meeting on legal education in 1922.

Mr. Marshall sought to show that the Conference exceeded its scope in advising state associations to attain integration through statute. Mr. Cohen showed that it had established precedents by approving the American Bar Association standard for legal education and by creating a committee to work for these standards with representatives in all the states, and also by approving bar influence in the selection of judges and appointing representatives of its committee in all states. That in fact its every formal action had been to urge upon state and local associations action consonant with the votes of the conference in various fields of bar activity. That it was actively urging states to work for rule-making power and that all the major activities of the Conference consisted of such work. But in bar organization, as in the other lines of

work, the Conference naturally cannot compel any constituent association to do anything whatsoever, its entire power being that of reasonable persuasion.

A motion to continue the committee on bar organization with the same personnel, made up to represent all opinions on the subject, was amended so that its adoption merely continued the committee.

Mr. Mason of South Dakota told of methods of discipline in his state, declared that every step in discipline should be in the hands of the courts, and that his local experience indicated no need for official bar organization to further disciplinary work.

#### Co-operation Between Press and Bar

Mr. Andrew R. Sherriff, Chairman, presented an interesting report on progress of his committee in the field shared jointly by press and bar. The report contains also a bibliography and is obtainable from the chairman (112 W. Adams St., Chicago.) The Conference authorized publication of sufficient copies to supply leading newspapers, schools of journalism, judges and officials.

After quoting from press comment upon improper articles concerning courts and trials the report says:

The extracts quoted above reveal the interesting fact that the profession of journalism is conscious of unhealthy germs within its own body just as the profession of the law, and is beset with the same problem, how to purify or eliminate them. Each profession is too often judged in the eyes of the public by its poorest rather than its best members; and in this we find a ground of mutual sympathy and understanding. But here the lawyers have an advantage in better organization, and discipline under the control of the courts, while the journalists apparently have no appeal against offending members except to the illusory resort of public opinion. Even there, however, the more powerful intellects and basic morals ultimately prevail; and in this fundamental truth is the challenge to the abler journalists of today.

The committee's scope is conceived to be limited to the effect of newspaper publicity on the courts and matters pending therein, which is of grave importance. Its work during the past year has been fully recorded in an article by the chairman published in the last March issue of the American Bar Association Journal under the title "Co-operation of Press and Bar to Date," where it can be seen without necessity to restate it here. We have nothing to do with the private wrongs of libel or defamation, which are properly dealt with in treatises on torts. Regarding the effect of crime news and other forms of exploited sins on the public morals, that too is well covered by other agencies, illustrated by the report of a sub-commission of the New York State Crime Commission published in the current July issue of the A. B. A. Journal, a very ample complement to the March article first mentioned. And even as to the technique of contempt of court we now say little, since it is our aim to promote information and mutual understanding, rather than to threaten offending editors with punishment. It is their desire to do right, rather than their temptation to do wrong, to which our efforts are addressed.

It is taken for granted that all thoughtful judges, lawyers and journalists now recognize the destructive effect of sensational publicity concerning courts and trials. At first impression the readers of such stuff would naturally ascribe the motive, and the blame, to the newspapers alone. And there of course it properly belongs; but not entirely. For our intensive pursuit of the subject, and searching of trails, often lead back toward our own ranks, and even to the doorstep of the courts themselves. This deplorable denouement it is within our duties to discuss.

Sensational stories about trials of shocking crimes, scandalous divorces and other morbid cases too often bear the earmarks of having been instigated by the lawyers. And it is not unknown even that judges have sometimes facilitated similar activities on the part of the press and other agencies of publication. The flow of evils that we complain of can be and should be dammed at their sources by the members of our

own profession, and by our mentors, the judges on the bench. And here again, like the journalists and the lawyers, the bench is made known to the public through the news columns more often by its inferior, than by its superior sort of incumbents.

There are many judges, representing perhaps the large majority of them, who have proven themselves, in dealing with the problem now in hand, to be learned, able, courageous, competent to protect the trust and dignity of the honored positions they hold. The last few years have brought out conspicuous types of them; judges who have enacted and enforced general rules of court against unwarranted intrusions and publicity, judges who have announced special rules against publication of improper written and pictorial matter on pending trials and other proceedings, judges who have wisely advised newspaper men of their rights and limitations, and warned them in advance against infractions; judges who have admonished, and convicted of contempt, attorneys and police officials for talking too much about pending cases for publication; judges who have excluded newspaper men from the courthouse during the deliberations of the jury; judges who on charges of contempt have fined and imprisoned newspaper men for publishing forbidden matter.

Recent conspicuous examples of abuse, such as appeared in the Leopold-Loeb-Franks case in Chicago, the Hall-Mills murder case in New Jersey, the Browning divorce case in New York, the Snyder-Gray murder case on Long Island, the Shapiro-Ford libel case in Detroit, the Aimee McPherson abduction case in Los Angeles, illustrate the necessity of applying restrictive measures to protect our courts, and the sacred functions entrusted to them, against embarrassing and misleading exploitation by the press.

The control and regulation of the publicity about a court rests to a great extent in its own hands. The judge presumably knows what is within the rights of the publishers, and what is objectionable to the court; if the newspaper men in attendance do not know their scope and their proper restrictions the judge may inform them, and then if they do not comply they could be prevented from attending further. As to pictorial reporting by means of photographs taken in or about the court room, the practice has already been adjudicated by high tribunals to be preventable, and punishable, whenever the presiding judge rules to exclude it.

There is no absolute right in the publishers of newspapers, for themselves, or for the information, amusement or agitation of the public, to attend or report trials; and the privilege of attending and reporting usually accorded has no basis in the constitutional guaranties concerning the freedom of speech or of the press, with which it is often confused. Newspaper men, like members of the public at large, may under some circumstances and for special reasons be excluded from trials, even though they be publicly held; and their conduct in attendance and in relation to the trial is subject to the reasonable regulation and control of the court, for the protection of the rights and persons of the litigants, their counsel, the witnesses, jurymen and all persons involved in the trial, and for the protection of the processes of the court for the ends of justice between the parties, which is the dominant consideration.

In bringing about an abatement of these evil practices which tend to impair the judicial system of our government, and to debase the public with false notions of the administration of public justice, the purposes of the committee, and of the bar of the country in this respect, will have progressed. But there is yet another laudable object which at the same time will be brought within the reach of the members of the press, and that is the facile and interesting method of educating their readers to a sound appreciation of public justice, law and social order. In the book entitled "The English Struggle for Procedural Reform" by Edson R. Sunderland, we find this suggestive paragraph on the probable educative effect of a well conceived method of popular law reporting:

"Still more significant was the course of the London Times. In 1825 it was a small newspaper running only twelve columns of reading matter, but even at that early stage of the war against judicial abuses it considered the subject so important, and presumably so interesting to its readers, that it devoted one-third of its entire space every day to reporting the doings of the courts. By 1850 the Times was giving its readers a little over thirty columns of news, and, of this, from six to eleven columns were filled with daily reports of the law courts. These reports were not sensational but gave a simple and readable account of what was actually going on in the various courts of the kingdom, familiarizing the reader with the personality and professional activity of the judges and lawyers, with the nature of the procedure, the delays, the costs, the technicalities, and the net accomplishments of the

system. For a hundred years the Times has maintained this extraordinary service, so that the English layman has probably been better acquainted with the work of the courts than the layman of any other country in the world."

The English are a law-respecting and a law-abiding people. We tender no comparison of our own people with them in this regard. But it is axiomatic that the life of our nation depends, and will more and more depend, on the popular understanding and observance of the law. There can be no more opportune time than the present for the press to cease making vulgar amusement of our law enforcing institutions, and to do its part to build them up in the knowledge, the wholesome respect and confidence of the people.

In the determination of further steps and policies the members of the committee feel a warm and sincere interest; and they recommend earnest pursuit of this important matter on the part of the Conference itself, the local bar associations, the members of the bench, and particularly on the part of the journalists.

Dealing with the matter of accuracy in reporting discussion of reviewing courts the report says that there is a prospect that the decisions of the United States Supreme Court will be offered to the press soon with correct interpretation. Mr. Sherriff later spoke of an enterprise started by Mr. Gregory Hankin, called Legal Research Service, to supply the press with Supreme Court decisions with technical skill. In recognition of this enterprise Mr. Elias Gates offered a resolution, which was adopted, as follows:

WHEREAS, it is much to be desired that the people may at all times be kept well acquainted with the law and its progress and development as reflected in the decisions of the Supreme Court of the United States, which can be partly achieved by publication in the newspapers and periodicals, of simple, readable, concise and accurate reports of its decisions:

Be it therefore RESOLVED: That it is the sense of this Conference of Bar Association Delegates that any project of legal research, efficient and qualified to do such work, would greatly aid toward the accomplishment of such desired purpose, and should be supported and encouraged to the end that some systematic effort may be made to disseminate through the press of the country concise and accurate reports of the decisions of the United States Supreme Court, so as to make them available to interested laymen, as well as to the Bar; and that the Conference recommends to the American Bar Association the reference of this resolution to its Executive Committee for its consideration and action.

### Requisites for Admission to Practice

Chairman Walter F. Dodd, on behalf of this committee, had obtained authority to include in the committee's scope the subject of conduct and discipline of lawyers at the 1926 meeting. During the noon hour he assembled the members of his committee, its state representatives and other interested delegates for a luncheon meeting and discussion. Sixty-five were present and interesting information and views were presented. Mr. Dodd's report, presented subsequently, was as follows:

### Report of Committee on Admission to the Bar

#### To the Conference of Bar Association Delegates:

In its report to this Conference at its meeting in Denver a year ago, this committee reviewed the requirements for admission to the bar in the several states, and indicated the progress that had been made to that time. The committee now reports as to its own organization and work during the past year, and as to changes during the same time in requirements for admission to the bar. In addition it presents a statement and recommendation regarding discipline of the bar—a subject referred to it in 1926.

#### State Representatives

At the 1926 meeting of the Conference, this committee was authorized to designate state representatives to act with it in their respective states upon the subject of admission to the bar. Through co-operation with state bar associations,

such representatives have been appointed in thirty states and the District of Columbia, as follows:

Arizona.....	Hon. Frank E. Curley
California.....	Mr. George F. McNoble
Connecticut.....	Hon. John W. Banks
Delaware.....	Hon. Robert H. Richards
District of Columbia.....	Hon. John Paul Ernest
Florida.....	Mr. Robert H. Anderson
Georgia.....	Hon. John M. Slaton
Indiana.....	Mr. Walter R. Arnold
Iowa.....	Mr. James A. Devitt
Kansas.....	Dean Harry K. Allen
Kentucky.....	Mr. Simeon S. Willis
Louisiana.....	Mr. Edwin T. Merrick
Maine.....	Mr. Phillip G. Clifford
Mississippi.....	Judge Stone Deavours
Missouri.....	Mr. C. B. Allen and Mr. Forrest C. Donnell
Montana.....	Hon. Lew L. Callaway
New Hampshire.....	Mr. Fred C. Demond
New Jersey.....	Hon. J. Henry Harrison
New York.....	Mr. John Kirkland Clark
North Carolina.....	Chief Justice W. P. Stacy
North Dakota.....	Mr. C. L. Young
Ohio.....	Mr. John L. Elden
Oregon.....	Mr. Thomas G. Greene
Pennsylvania.....	Hon. Harry S. Knight
Rhode Island.....	Mr. Edward C. Stines
South Carolina.....	Mr. C. E. Daniel
Tennessee.....	Mr. F. A. Berry
Texas.....	Prof. Ira P. Hildebrand
Washington.....	Mr. W. G. McLaren
Wyoming.....	Hon. C. A. Zaring

Through each state representatives it has been possible to keep more closely in touch with the situation throughout the country. It is hoped that within the next year all states will be so represented. The state representatives are in a number of cases members of state examining boards, and are vitally interested in improving the standards in their states. Mr. John Kirkland Clark, who is chairman of the New York Board of Examiners, had an important share in the improvement in standards for admission in that state in 1927.

#### Standards of Admission

The report for 1926 listed Kansas, Illinois, West Virginia, Ohio, Montana, Wisconsin and Colorado as the states that had taken important steps toward higher standards of admission to the bar. To this list we now add New York, and we report that Colorado by further steps has come fully into the small group of states having the highest standards.

The Court of Appeals of New York on June 7, 1927, approved amendments to its rules under which persons beginning the study of law on or after October 15, 1928, shall have one year of college work or its equivalent, and those beginning on and after October 15, 1929, shall have two years of college work or its equivalent. The "equivalent" of college study is carefully safeguarded by the rules, and the standard of equivalence is applied by the State Department of Education. The improvement of standards in New York was promoted by the law schools, by the Association of the Bar of the City of New York and the New York County Lawyers' Association, and was supported by a memorandum submitted by the American Bar Association through its president, Hon. Charles S. Whitman.

Progress toward higher standards has been made in New Jersey, New Mexico, Kentucky, Virginia, Maine and the District of Columbia. Rules adopted by the State Board of Education of New Jersey on December 4, 1926, do not directly affect general educational requirements for admission to the bar, but provides that law schools, in order to receive a license and to confer the LL.B. degree shall, after September, 1927, require at least one year of college work for admission, and after September, 1928, require at least two years of college work. The New Jersey step is important, inasmuch as most applicants for admission to the bar now come from the law schools.

The New Mexico rules appear at first sight to be quite stringent in requiring graduation from a law school meeting the requirements of the American Bar Association, or in the alternative a year of additional study under some member of the New Mexico bar, but the State Board of Bar Examiners is permitted to authorize any applicant to take the bar examination on certificate from any law school having a three-year course, and non-law school graduates are permitted to take the examination after continuous study of three years either under a member of the bar or in a reputable law school requiring actual attendance, or to qualify partly by each such method.

By a legislative act of 1927 Maine required a high school education. In Kentucky on and after July 1, 1928, graduation from a high school is required, and not less than two years of law study, one of which must have been by attendance upon a law school. In the District of Columbia a high school education is now required of applicants for admission to the bar. Virginia now requires that the bar examination in all subjects be taken at one time.

In Washington the State Board of Law Examiners obtained favorable legislative action on a bill to require two years in college and three years in an approved law school, but the measure was vetoed by the governor. In Wisconsin and Utah legislation was proposed, but defeated, to withdraw from the law department of the State University the right to have its graduates admitted to the bar without examination.

The Committee regrets that the Carnegie Foundation for the Advancement of Teaching found it necessary to omit in 1926 its annual review of progress in legal education and in standards for admission to the bar, but understands that this publication will be resumed at the close of the current year. The West Publishing Company continues its useful annual compilation of "Rules for Admission to the Bar."

#### Character of Bar Examinations

The Committee feels that a careful analysis should be made of the methods of examination for the bar. New York is making some use of the so-called "true-false" questions. Other states are experimenting with research tests. Law schools have become the chief agencies that train for the bar. To what extent must their courses train primarily for bar examinations? Educational standards for admission to the bar are rising. We should know much more about the bar examination as the official test of legal education. Through the examinations they set, bar examiners may do much to change the direction or aid the progress of legal education.

#### Character and Fitness

Attention has been called to the problem of tests of character and fitness prior to admission to the bar, through a series of articles by Mr. Charles S. Hill of the Massachusetts Character Committee. These articles appeared in the May, November, 1926, and January, 1927, numbers of *The Law Student*, a journal published by the American Law Book Company. In the October, 1926, and January, 1927, numbers of the same journal appeared statements regarding character and fitness in Ohio, the District of Columbia, Kentucky, Wyoming, California, Colorado, Delaware, Florida, Montana, Nevada, North Dakota, Oklahoma, Tennessee, Vermont, Wisconsin and Idaho. We need an investigation of this problem in all the states. The Pennsylvania State Bar Association in co-operation with the state supreme court has worked out plans for a careful supervision over character and fitness in that state.

#### Discipline after Admission

Investigation of character and fitness before admission is important, and will reject a few unfit applicants. But most persons seeking admission to the bar are of an age such as to make investigation before admission of little value. The chief problem is that of discipline after admission.

At the 1926 meeting of this Conference the Committee was instructed to report recommendations regarding the subject of discipline of members of the bar after admission. The Committee has given consideration to (1) the moral or ethical standards of the bar and (2) the enforcement of such standards. Formal standards of the legal profession are dealt with in the Canons of Legal Ethics, adequately annotated by Mr. Charles A. Boston; and the American Bar Association now has a special committee on supplementing these canons, of which Mr. Boston is chairman.

The enforcement of standards is more important. No study has yet been made of the organized methods of discipline throughout the country. In a small group of states (Alabama, New Mexico, Idaho, North Dakota and California) acts have recently been passed for the incorporation of the bar, with disciplinary authority in the hands of the incorporated bar. Generally, throughout the country, discipline is in the hands of the courts, which ordinarily act in specific cases only on charges preferred by bar associations. In some states the disciplinary proceeding is in the highest court, in others it is in intermediate courts of appeal, and in still others it is in the trial court. The bar associations act through volunteer grievance committees, though in New York, Chicago and some other cities attorneys are retained to give their whole time to the work of grievance committees and to the prosecution of charges presented by such committees. The expense of investigation and prosecution is normally borne by the bar

associations, though in New York a part of the cost is borne by the counties. Members of grievance committees give to their work such time as they can spare from practice. Where proceedings are instituted in a court of review, cases are often referred to commissioners or masters to take testimony and to make reports; and such commissioners or masters are in some states asked to serve in such cases without pay.

Mr. Walter N. Arnold, the representative of this committee in the state of Indiana, has presented to the committee a carefully written report regarding the situation in that state, where he says there "is too much apathy at the bar." The necessity that volunteer groups spend a large amount of time appears to be one of the main difficulties, and Mr. Arnold suggests that reasonable compensation should be paid to members of grievance committees.

In Indiana disciplinary proceedings are ordinarily in the trial court, jury trial may be demanded, and the proceeding is treated as an adversary civil suit in which the persons making the complaint are arrayed against the lawyer complained of. In Illinois and some other states this proceeding is treated more distinctly as of a public character, and in some states it is regarded as quasi-criminal and as substantially requiring the proof of improper acts beyond a reasonable doubt.

The increased importance of the lawyer and the great increase in the number of persons in the practice of the law make necessary more adequate methods of discipline. Methods now in use are largely haphazard and casual, and have not been adapted to modern conditions, though bar associations have at their own expense done what they can to cope with the situation.

The high standards of the bar and its high position in the community must be maintained. The bar itself is the body to take steps to this end. The first step toward improvement is a thorough inquiry into present conditions, in order that progress may be based on adequate knowledge.

#### Recommendations

The Committee asks authority from the Conference to seek funds for a thorough investigation of the standards and discipline of the bar in the United States, and that it be authorized to take such further steps as may be necessary for the conduct of such an investigation, and the report of the results thereof to the Conference. The Committee further asks that this Conference request the American Bar Association to approve the proposed investigation.

The Committee held a luncheon conference with its state representatives on August 30, 1927, for the discussion of the problem of discipline. About sixty persons attended. Brief statements were made by Mr. Silas H. Strawn of Illinois, Mr. Walter H. Arnold of Indiana, Mr. J. M. Lashly of Missouri, Mr. Charles R. Hollingsworth of Utah, Mr. Harry S. Knight of Pennsylvania, Mr. John B. Sanborn of Wisconsin, Mr. Walter S. Foster of Michigan, Mr. M. T. Rosenberg of New Jersey, Mr. Josiah Marvel of Delaware, Mr. John Kirkland Clark of New York and Dean Robert M. Davis of Idaho. The success of this luncheon meeting justifies the hope that a similar conference may be held at the next annual meeting.

FREDERIC B. CROSSLEY, ERNST FREUND, ELIAS GATES, HERBERT S. HADLEY, CHARLES B. HOLLINGSWORTH, GURNEY E. NEWLIN, ROBERT P. SHICK, SILAS H. STRAWN, HENRY W. TAFT, GUY A. THOMPSON, WALTER F. DODD, Chairman.

The recommendation of the committee was approved by the Conference and the committee was continued.

Mr. Thomas C. Ridgway, of Los Angeles, president of the California State Bar, presented to the Conference a system of taking bar opinion as to judicial candidates which ably supplemented the report of the committee on judicial selection. In Los Angeles county the bar worked out a form of ballot and counting for its plebiscite which accomplishes far more in getting the real opinions of lawyers than has ever before been possible. The address was aided by large scale charts showing the nature of the ballot and of counting. It is to be hoped that an article on the subject with reproduction of the charts will be made available to the bar of the country in the pages of this JOURNAL.

Mr. Kemper Campbell, president of the Los Angeles Bar Association was requested to inform the delegates concerning the success of the system

in the past three years. Last fall, he said, the Association was successful in the election of nine judges out of a total of ten places. Last spring in electing 24 judges, each to a particular judgeship, eighteen of those winning association support were unopposed. One sitting judge, opposed by the association, was defeated. Recently the governor had to appoint ten new Superior Court judges out of 160 aspirants. The association voted and the governor saved himself a great deal of embarrassment and pleased the community by appointing those approved by the bar under the plebiscite.

Mr. Campbell also said that he had invited every member of his association to say what committee he would like to be a member of, a democratic movement which strengthened the association.

I think one of the difficulties of some of our older organizations, if I may be so bold as to suggest, is a lack of that democratic spirit. I think there should be less paternalism.

Mr. James D. Shearer reported substantial increases in judicial salaries as the result of bar association efforts in Minnesota.

Indiana lawyers obtained three notable pieces of legislation, reported Mr. B. Lawrence Davis, these being the declaratory judgment law, an act for sterilization of habitual criminals and an act establishing a criminal identification bureau.

A remarkable clean-up of ambulance chasing in Milwaukee was related by Mr. Charles Friend, a delegate from that city. The Lawyers' Club and the Milwaukee Bar Association aided the courts in putting an end to a very thoroughly organized business involving the hiring of lay agents to procure business, and other unethical practices. There remains yet, said Mr. Friend, the matter of finally dealing with the culprits, and this is expected to be by way of injunction to avoid the delays incident to criminal procedure.

Mr. Adolph B. Rosenfield told of inspiring progress on the part of the local association of Long Beach, California, one of the fastest growing cities in the country.

Remarks by Mr. Ridgeway of California also emphasized the activity of the bar in that state. By constitutional amendment the bar put over the judicial council and conferred power on the appellate court to make findings and take additional evidence to sustain a judgment. In the last session of legislature the bar secured passage of its compulsory, self-governing bar bill. Lawyers who do not register before Nov. 18, 1927, will lose the right to practice. Those who do will have equal participation in electing officers to direct the business of the profession. Many important changes in criminal procedure were also adopted at the last session. Increases in judicial salaries were also obtained.

The meeting concluded with adoption of the report of the committee on nominations and a brief acceptance of the office of Chairman by Mr. Josiah Marvel.

#### Correction

In the October issue of the JOURNAL the name of Mr. John M. Grimm, a member of the Council for Iowa of the American Bar Association, was incorrectly spelled.

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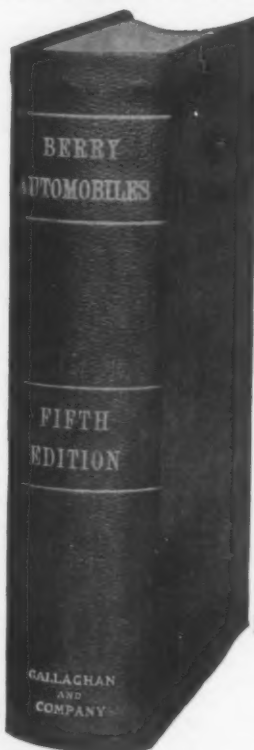
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## NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

### Idaho

At the annual meeting of the Idaho State Bar, held at Boise on August 12 and 13, Mr. A. L. Merrill of Pocatello was elected president; Mr. C. H. Potts of Coeur d'Alene, vice-president, and Sam S. Griffin of Boise, secretary. The Idaho State Bar, as is now generally known, is organized under statutory enactment which requires all practicing attorneys to be members. At the last meeting Mr. Jess Hawley of Boise was elected as one of the commissioners provided for in the statute, the other two members of the board being Mr. A. L. Merrill of Pocatello and Mr. C. H. Potts of Coeur d'Alene.

The program included the following addresses: Address of Welcome, Hon. Frank L. Stephan, Attorney General of Idaho; Presidential Address, Hon. Frank Martin; "Condition of the Work in the Supreme Court and Suggestions for Expediting the Determination of Appeals," Hon. William E. Lee, Chief Justice; "The Indeterminate Sentence Law," Hon. William M. Morgan, formerly Chief Justice; "The Responsibility of the Legal Profession to Society," by Hon. E. O. Howard; "The

Mexican Land Problem," Hon. William E. Borah; "The Bench and Bar of Idaho that I Have Known," Hon. Isaac N. Sullivan, formerly Chief Justice; "Application of Psychological and Scientific Tests to Testimony," Dr. J. W. Barton of the University of Idaho; "Limitations in Uniformity of Laws," by Hon. James F. Ailshie, formerly Chief Justice Idaho Supreme Court and Member of the National Conference of Commissioners on Uniform State Laws; "The American Law Institute," Hon. Emmett N. Parker, Justice of Supreme Court of State of Washington; "Building a Judicial System for Idaho," Hon. A. H. Oversmith.

### Illinois

The Chicago Bar Association gave a dinner in honor of Hon. Silas H. Strawn, recently elected President of the American Bar Association, on the evening of Tuesday, Oct. 11. Mr. Strawn is a former President of the Chicago Association and has long been an active and enthusiastic member of that organization. The large dining room was crowded and the occasion was thoroughly enjoyed by all. President Carl R. Latham

presided and made a few introductory remarks before calling on Major Edgar B. Tolman, Editor in Chief of the Journal, and also a former President of the local association.

Major Tolman spoke of the accomplishments of the Bar of America, in the direction of securing higher educational qualifications for admission, more effective disciplinary action, greater efficiency in the administration of Justice, and a more careful selection of judges. He concluded by felicitating the guest of honor and also the American Bar Association on its new President. Judge Jacob M. Dickinson, former President of the American Bar Association, was next introduced and spoke in his usual felicitous manner. Hon. George T. Page, of the United States Circuit Court of Appeals for the Seventh Circuit, also a former President of the national organization, was the next speaker. He felicitated the new President, spoke of what the American Bar Association had accomplished, told of the difficulties of starting the Journal, and concluded by appealing to the lawyers of Chicago and Illinois to establish a national headquarters and a Law Club to which lawyers from all over the country may go whenever their business brings them to Chicago.

Hon. Silas H. Strawn, the last speaker

expressed his appreciation for all that had been said and done in his behalf, spoke of the work of the Association, interspersed some humorous illustrations of what a President of the American Bar Association is expected to do, and expressed the hope that he might justify to some extent during the coming year the complimentary things that had been said about him.

## Missouri

The Missouri State Bar Association held its annual meeting in Columbia on Sept. 30 and Oct. 1. One of its first acts was to appropriate \$1,000 for the tornado sufferers, the money to be distributed by the executive committee of the association. About three hundred members were in attendance at the first session.

Addresses of welcome were delivered by Mayor William J. Hetzler of Columbia and by Mr. Arthur Bruton, president of the Boone County Bar Association, after which Mr. Clarence A. Barnes, of Mexico, Mo., delivered the presidential address. President Barnes spoke of various legislative reforms, dwelling on the workmen's compensation act passed at the recent session; the statute revision committee appointed at the last session, from which he expects substantial results; the establishment of a separate reformatory for young men between the ages of 17 and 25; the increased penalties imposed by the legislature for felonies committed with firearms; the establishment of county highway commissioners, and greater protection for numerous forms of wild life.

The report of Treasurer James E. King showed a balance on hand of \$16,000 and a substantial increase in membership. The Treasurer reported a bequest of \$500 to the association made by the late Judge Shepard Barkley.

The report of F. C. Donnell, chairman of the committee on legal education and admissions to the bar, recommended that uniform and higher qualifications for admission to the Bar be urged on the legislature at its next session, and called attention to the fact that only five or six states had lower educational requirements than Missouri.

Mr. Roy D. Williams, chairman of the Bar Association committee, reported that more than forty local and district groups are organized and active within the state. W. H. H. Piatt, chairman of the committee on uniform state laws, submitted resolutions advocating and indorsing a uniform sales law and a uniform body of statutes dealing with commercial subjects, both of which were unanimously adopted. Mr. E. A. Krauthoff, who led the fight to have the legislature appoint a statute revision committee, reviewed the struggle and praised the legislature for its action.

The following addresses were on the program for the first day: "Workmen's

Compensation Act," William R. Schneider, St. Louis; "Trial Lawyers and Courts," John T. Barber, Kansas City; "The Cause of the Recent Increase in Crime Which I Think Is Revealed by the Missouri Crime Survey," Justice J. T. White of the Missouri Supreme Court.

The morning session of the second day was devoted to exercises in connection with the dedication of Tate Memorial Hall, which had been presented to the University of Missouri. The following addresses were made on this occasion: Presentation of Building, Frank R. Tate; Acceptance, Judge James E. Goodrich; For the Alumni, E. J. White; For the Bar of Missouri, Guy A. Thompson; For the Bench, Judge R. F. Walker; Dedication Address, "Law and Laws," Dean Roscoe Pound of Harvard University.

The annual dinner was held Friday evening, and on this occasion addresses were delivered by Ernest H. Green of St. Louis, incoming president of the association; Roscoe Pound; Hon. Merrill E. Otis, Judge U. S. District Court, and Hon. Frank E. Atwood, Justice, Missouri Supreme Court.

The following officers were elected for the ensuing year: Ernest H. Green, St. Louis, president; Don Lamm, Sedalia, vice-president; W. A. Broadshire, Farmington, second vice-president; Harry W. Timmons, Lamar, third vice-president; James E. King, St. Louis, treasurer; James E. Potter, Jefferson City, secretary; Clarence A. Barnes, member executive committee.

## North Dakota

The annual meeting of the North Dakota Bar Association was attended by about one hundred and fifty members and their ladies. The principal addresses were made by Dean Pound of Harvard University Law School and Senator Walsh of Montana. Various interesting committee reports were made and discussed, but as there will be another meeting of the Association before the meeting of the legislature in 1928, final action was taken on few of the proposals.

The work of completing the district organization under the leadership of F. T. Cuthbert of Devil's Lake, showed satisfactory progress and will doubtless be completed during the coming year.

Following are the officers for the ensuing term: President, Aubrey Lawrence, Fargo; Vice-President, John H.

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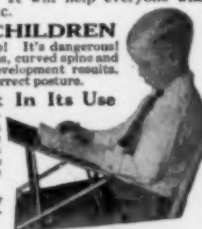
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At a meeting of the Executive Committee held on Oct. 6, Hon. Geo. M. McKenna, of the District Court of the Third District, was selected to represent North Dakota at the conference to be held under the auspices of the American Law Institute at Chicago on Oct. 27, 28, and 29. The matter of inviting Associations in near-by states to a conference to be held at some point in North Dakota for analytical consideration of some of the tentative drafts of the Institute already prepared and printed was considered but no definite action was taken.

At this meeting of the Executive Committee, in order to create greater interest in the work of the American Law Institute, the Secretary was instructed to supply each organized district association with two copies of the tentative drafts on hand.

## Oklahoma

Oklahoma district and superior court judges formed a state organization at a meeting held at Oklahoma City on October 24, according to an account in the Oklahoma City Oklahoman. A temporary organization had been formed earlier in the year as a preliminary to the formation of the permanent body. Judge John B. Ogden of Ardmore was chosen president; Judge Tom. G. Chambers of Oklahoma City, vice-president; Judge John L. Norman of Okemah, secretary-treasurer. The following were chosen members of the executive committee: Hon. E. L. Richardson of Lawton, Fred A. Speakman of Sapulpa, Jesse J. Worten of Pawhuska and Charles Swindall of Woodward.

Oklahoma City was selected as the permanent meeting place, and the next annual convention will be held on the second Monday in June. The executive committee was empowered to act for the organization in the interval between meetings.

The Oklahoma County Bar Association gave a dinner to the members of the new organization and other guests.

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FEDERAL COURT DECISIONS cited are to the U. S. SUPREME COURT OFFICIAL EDITION; U. S. LAW ED; SUPREME COURT REPORTER and FEDERAL REPORTER.

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By

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